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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 33

ANTHONY CASTALDI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DANIEL H. GREENBERG
Attorney for Petitioner
110 East 42nd Street
New York, N. Y. 10017

32 CASE PRESS INC., 421 Hudson St., N.Y.—ORegon 5-4540

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IN THE

Supreme Court of the United States

October Term, 1964

No.

ANTHONY CASTALDI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Anthony Castaldi prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on November 17, 1964.

Opinion Below

The opinion of the Court of Appeals in this case has not yet been reported. It is set forth as Appendix A, hereto, *infra.*

Jurisdiction

The judgment of the Court of Appeals was entered on November 17, 1964. The jurisdiction of this Court is invoked under Title 28, United States Code, § 1254(1).

Questions Presented

1. Whether it was constitutionally proper under the factual circumstances of this case to prosecute and convict petitioner for criminal contempt of court for his refusal to answer questions before a grand jury as to matters about which he had previously been acquitted, by purporting to grant him immunity under the provisions of Title 18, United States Code, § 1406.

2. Whether petitioner was constitutionally entitled to an indictment and to a trial by jury for the crime of criminal contempt of court, which, by virtue of the sentence of two years imprisonment imposed against him, constituted a felony.

3. Whether the sentence of two years imprisonment imposed against petitioner in this case is in violation of his constitutional rights.

Constitutional Provisions, Statutes and Rule Involved

The pertinent constitutional provisions, statutes and rule involved in this case are set forth in Appendix B, *infra*.

STATEMENT OF THE CASE

The Nature of the Proceedings

Petitioner Anthony Castaldi was convicted of criminal contempt of court and sentenced to two year's imprisonment, subject to a limited purge clause, under Rule 42(b), Federal Rules of Criminal Procedure, for his refusal to answer questions before a federal grand jury. On July 2, 1964, an order to show cause was issued by District Judge Inzer B. Wyatt, ordering petitioner to appear before him on July 8, 1964, to show cause why he should not be punished for contempt for having refused to answer questions before a grand jury as he had been directed theretofore to do by District Judge Wilfred Feinberg on May 15, 1964, and as he had also been directed to answer by Judge Wyatt on July 2, 1964.

At the proceedings before Judge Feinberg on May 14 and 15, 1964, the government applied to grant immunity to petitioner under the provisions of Title 18, United States Code, § 1406. Following compliance with the procedural requirements of this statute, immunity purportedly was granted to petitioner.

On July 8, 1964, petitioner and his counsel appeared before Judge Wyatt. Petitioner there filed with the court a written answer to the charges, in the form of an affidavit of his counsel, containing a demand for a trial by jury of the contempt charge. However, this demand for a jury trial was refused and the contempt hearing proceeded before the court alone. On July 9, 1964, petitioner was convicted of contempt of court and sentenced to two years imprisonment, subject to a purge clause if petitioner appeared and testified before the grand jury before its term expired.

The Record

The record in this case consists of the original record of proceedings in the district court and a printed appendix filed by petitioner in the court of appeals. The printed appendix contains all of the proceedings and exhibits of the district court.

Prior Proceedings

On August 15, 1962, an indictment was filed in the District Court for the Southern District of New York, bearing Docket Number 62 Cr. 790, in which petitioner Anthony Castaldi was accused, along with 19 co-defendants and 21 other co-conspirators not named as defendants, of conspiracy to violate the Federal Narcotics Laws. This indictment is annexed hereto as Exhibit C, *infra*.

This case, known as *United States* v. *Borelli,* was brought to trial in November, 1963, before District Judge Dudley B. Bonsal and a jury, with 16 of the 20 defendants standing trial. After a six weeks trial the jury convicted eleven defendants and acquitted five. Among those acquitted was Anthony Castaldi.

At the trial of this indictment the sole witness to testify against petitioner was co-conspirator Salvatore Rinaldo. This testimony related to petitioner's alleged participation in the narcotics conspiracy, and concerned Rinaldo's transactions with petitioner and other defendants supposedly taking place in July or August 1955. Rinaldo testified in all concerning ten or eleven defendants. The jury obviously did not believe Rinaldo's testimony against Castaldi since it acquitted Castaldi.

Following petitioner's acquittal in December, 1963, the grand jury proceeding was commencing in February 1964

Parenthetically, the convictions in the *Borelli* case were reversed by the Court of Appeals on July 31, 1964, and a new trial was ordered. This case is reported at 336 F. 2d 376. See also *Cinquegrano* v. *United States,* No. 541, O.T. 1964, and *Mogavero* v. *United States,* No. 546, O.T. 1964, certiorari pending in both cases, defendants in the *Borelli* case.

The Contempt Proceedings

On February 3, 1964, petitioner was served with a grand jury subpoena requiring his appearance on February 13, 1964. He appeared, was sworn, gave his name and address and thereafter he refused to answer any questions, invoking his constitutional privilege against self-incrimination. The material questions put to him related to his acquaintance with persons named in the *Borelli* indictment or others previously convicted of narcotics offenses.

Petitioner made further apperances before the same grand jury on April 23 and May 7, 1964. Both times he invoked his personal privilege against self-incrimination. Thereafter the government took steps to invoke the immunity provisions of the Narcotics Control Act, Title 18, United States Code, § 1406. On May 14, 1964, the assistant United States attorney appeared before District Judge Wilfred Feinberg for an order directing petitioner to testify before the grand jury under a grant of immunity. After a hearing on May 14 and 15, 1964, Judge Feinberg signed an order requiring petitioner to appear before the grand jury, granting him immunity under the statute. At this hearing approximately 70 questions were related to

the court as those put to petitioner which the government wanted answered. These questions related essentially to the charges made against petitioner in the narcotics conspiracy trial.

Thereafter on June 1, 1964, petitioner again appeared before the grand jury and again he refused to answer the questions put to him. On July 2, 1964, petitioner was brought before Judge Wyatt for the invocation of summary contempt procedures under Rule 42(a), F. R. Cr. P. Instead, the contempt proceeding was instituted under Rule 42(b), F. R. Cr. P., as described above.

The questions put to petitioner in substance were concerned with the factual allegations of the indictment and trial in which he was acquitted. The questions were framed as though the charges were true and petitioner was guilty instead of his having been acquitted. For example, petitioner was asked how well he knew many of the co-conspirators and co-defendants, named in the *Borelli* case.

For example, the questions included the following:

> Q. Isn't it a fact, Mr. Castaldi, that Salvatore Rinaldo testified against you in a federal narcotics case in this District?
>
> Q. In the case in which Rinaldi testified against you, it was stated that he'd been introduced to you by Joseph Mogavero and Carmine Locassio. Have you any dealings with Rinaldo involving narcotics?
>
> Q. Do you know Joe Mogavero?
>
> Q. Do you know Carmine Locassio?
>
> Q. Have you ever heard of Locassio or Mogavero?
>
> Q. As a result of the meeting, Rinaldo testified he delivered narcotics for you to a person known as "Johnny."

Q. Who was "Johnny"?

Q. What was the source of your—for those narcotics?

Q. Was your source in this country?

Q. Was your source outside this country?

Q. Do you have more than one source of supply for narcotics?

Q. Do you still have dealings with Johnny with regard to narcotics?

Q. Do you know what Johnny did with the narcotics after you had them delivered to him?

Q. Do you supply narcotics for anybody else?

Q. Have you ever handled narcotics?

Q. How long did you know Joe Mogavero or Carmine Locassio before you met Rinaldo?

Q. How much did you pay Locassio and Mogavero for the narcotics?

Q. Do you know where they obtained the narcotics?

Q. Tell us what percentage of profit you realized from the sale of these narcotics. (App. 106a-107a)

It can easily be seen that the grand jury inquiry was concerned with the facts of the prior case against petitioner and that the principal objective of the inquiry was an attempt to go behind petitioner's acquittal, to attack it collaterally through a contempt proceeding.

Following petitioner's sentence of two years, he was released by the Court of Appeals in bail pending appeal of $20,000.

REASONS FOR GRANTING THE WRIT

This case involves substantial questions of constitutional law concerning criminal contempts of court and questions about the proper administration of federal criminal justice. It is submitted that review by certiorari is warranted herein.

1. Under the factual circumstances of this case it was not constitutionally proper to prosecute and convict petitioner for criminal contempt of court for his refusal to answer questions before a grand jury, as to matters about which he had previously been acquitted, notwithstanding his purported immunity under 18 U.S.C. § 1406. It is clear from the record that these questions related in substantial and material part to the facts and issues of the case wherein petitioner had been acquitted. To put it succinctly, petitioner has a right to be let alone after being acquitted, instead of being continually harassed by the prosecution, as he has been in this case since his acquittal. *Piemonte* v. *United States*, 367 U.S. 556, 561, 564 (dissenting opinion).

Petitioner's acquittal established as a matter of constitutional law that he was not part of the narcotics conspiracy alleged in the *Borelli* case. Accordingly, there was no real occasion to tender him a purported grant of immunity to enable the prosecution to question him about that case. Heretofore this Court has sustained the validity of the immunity provisions. Cf. 18 U.S.C. § 1406 as to one previously convicted of a narcotics violation (*Reina* v. *United States*, 364 U.S. 507; *Piemonte* v. *United States*, 367 U.S. 566), but it has not held that this statute is to be applied to one acquitted of the offense. Nor has this Court held that one *acquitted* of narcotics conspiracy can there-

after be re-examined and re-tried for contempt upon questions which assume the truth of the narcotics conspiracy charge laid against him. The rules of double jeopardy, *res judicata* and collateral estoppel compel an answer that the accused need not answer the questions put to him and that he has the right to be free of further harassment about this matter. *Sealfon* v. *United States,* 332 U.S. 575, 578; *United States* v. *Kramer,* 289 F. 2d 909; *United States* v. *Sabella,* 272 F. 2d 206; *Zdanok* v. *Glidden Company Durkee Famous Foods Division,* 327 F. 2d 944; *Cf. Developments in the Law, Res Judicata,* 65 Harvard Law Review, 818, 874-880 (1952).

The Court of Appeals rejected petitioner's argument on this point with the comment that because "the contempt conviction is not the same offense as the earlier conspiracy proceeding, double jeopardy plays no role here, just as it plays no role in the case of a prior conviction. Similarly, the doctrine of *res judicata* and collateral estoppel both contemplate subsequent litigation involving claims and facts once adjudicated. The only question in the contempt proceeding was whether Castaldi wrongfully refused to obey court orders, not whether he conspired to sell narcotics." (Slip Opinion, p. 157 pp. 17-18 *infra*). This simplistic argument completely overlooks the principal point here, that the contempt proceeding was undertaken solely in connection with the facts of the case in which petitioner had been acquitted and constituted a collateral attack upon the judgment of *autrefois acquit.* The material questions to petitioner show this clearly.

For this reason the order of the District Court granting immunity was wrong as a matter of law, as was the direction to petitioner to answer the questions before the grand

jury. He was entitled to rely upon the judgment of *autrefois acquit* and to remain silent. The immunity provisions of § 1406 were therefore inapplicable to him. Any other rule will do violence to petitioner's rights as an acquitted person, and under the circumstances render the provisions of § 1406 violative of both the double jeopardy and due process clauses of the Fifth Amendment.

Finally, it is unfair to petitioner to require him to undergo the process of numerous grand jury appearances, several court appearances, the cost and inconvenience attached to retaining counsel and printing records and briefs, as well as the stigma and jail term imposed in a contempt conviction, in a situation where he has been acquitted of the underlying charge.

2. Petitioner was constitutionally entitled to an indictment and to a trial by jury for the crime of criminal contempt of court, which, by virtue of the sentence of two years imprisonment constituted a felony. The Fifth Amendment provides that no person shall be held to answer for an "infamous" crime, unless on a grand jury presentment or indictment. The Sixth Amendment states that in all criminal prosecutions the accused shall enjoy the right to a trial by jury. A crime is made "infamous" by the quality of the punishment which may be imposed, *Ex Parte Wilson,* 114 U.S. 417. All felonies are infamous crimes, *Wong Wing* v. *United States,* 163 U.S. 228, 237, for which jury trials are required. 18 U.S.C. § 1(1) classifies as a felony all offenses punishable by death or imprisonment exceeding one year.

Clearly petitioner was convicted of a felony, and accordingly he was entitled to be prosecuted by indictment and trial by jury before the imposition of a felony sentence. See

District of Columbia v. *Clawans*, 300 U.S. 617, 627; *United States* v. *Barnett*, 376 U.S. 681, 685; fn. 12, and dissenting opinions by Mr. Justice Black and Mr. Justice Goldberg.

Now, we are aware that this Court held squarely in the *Barnett* case, *supra*, last term, that an alleged contemnor does not have a constitutional right to a jury trial in a contempt case. However, the imposition of felony sentences in contempt cases may require that all of the safeguards attached to felony trials be afforded to contempt defendants before felony sentences may be imposed.

Title 18, United States Code, § 401 defines criminal contempts. It is to be noted there that no punishment is provided, but rather the power is left to the court "to punish by fine or imprisonment, *at its discretion*" the disobedience or resistance to its lawful order. Unless this statute is constitutionally defective for vagueness, it would seem to vest in the district court (or other court concerned) the power to define crimes by the punishment it imposes. But we cannot believe that Congress intended to vest in the courts the power to define crimes by the sentences it imposes, and at the same time to strip constitutional rights from defendants in criminal contempt cases by authorizing the imposition of felony sentences.

In other words, the discretion vested in the court concerned is limited by the constitutional provisions relating to prosecutions of felonies by indictment and trial by jury. It is to be remembered that in § 1 of Title 18, the classification of crimes is preceded by this significant statement:

> "Notwithstanding any Act of Congress to the contrary:"

This means what it says. If you sentence a person to imprisonment for more than one year *it is a felony,* no matter what else you may call it.

Accordingly, unless petitioner received an illegal or impermissible sentence, he was improperly tried and sentenced for a felony without affording him his constitutional rights to an indictment and jury trial.

3. Under the circumstances of this case, and the developing law on this subject, the two years sentence of imprisonment imposed against petitioner is in violation of his constitutional rights. The "dramatic increase in recent years in the severity of the punishment imposed in the federal courts without trial by jury for criminal contempt" (Goldberg, J., dissenting in *Barnett, supra*) requires that this Court exercise its supervisory function over the administration of federal criminal justice to put a stop to those blatantly unconstitutional sentences.

The analysis of the law concerning the imposition of felony sentences in contempt cases without felony trial safeguards, as discussed in point 2 above, makes it clear that unless all felony contempt cases be treated as falling within the constitutional requirements for felony trials, the limits of contempt sentences will necessarily have to be that set forth for petty or trivial offenses.

In the pending case of *Harris* v. *United States* (No. 526, O.T. 1964), the Solicitor General acquiesced in the grant of certiorari on the question of permissible sentences in contempt cases. The issues as to permissible sentences is nearly identical in this case, except that here petitioner received a two years sentence while in *Harris* the sentence

was one year. On December 14, 1964, the Court granted certiorari in the *Harris* case limited to questions 2, 3 and 4 as presented by petitioner there.

On the question of permissible sentences and this Court's opinion in *Barnett*, the Court of Appeals distinguished the power of the District Court to impose harsh sentences both in this case and the *Harris* case from the *Barnett* case by stating that "the contempt in *Barnett* was not committed in the presence of the Court and the contempt proceeding took place after compliance with the Court order. Here, as in *Harris*, the comtempt was committed in the Court's presence and the proceeding preceded compliance"[1] (Slip Opinion, p. 159, p. 19, *infra*). We submit that such distinctions are artificial and do not reach the essential issue of the permissibility under constitutional standards of maximum punishments in contempt cases.

Moreover, the Court of Appeals cited the case of *Rollerson* v. *United States*, 33 USLW 2173, 2174, as conflicting with the rule it was declaring in both this and the *Harris* case as to maximum permissible punishments in contempts committed in the presence of the Court. It would thus appear that there is a conflict of decision between the Second and District of Columbia Circuits on this important question, and this conflict should be resolved by this Court.

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[1] The Court of Appeals did point out in its opinion that the proceeding in this case was under Rule 42(b), F. R. Cr. P., while in *Harris* the proceeding was a summary proceeding under Rule 42(a). The Court then stated that a 42(a) proceeding would have been proper here. However, the contempt proceeding in this case was for failure to testify before the Grand Jury, and was not a contempt before the Court. Thus the Court's opinion as granted herein, was in error on this point.

In view of the grant of certiorari in the *Harris* case and the conflict of decision in the circuits between this case and the *Rollerson* case, certiorari should be granted here for a full review of this case on the merits.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be granted and this case ordered briefed and argued along with the *Harris* case, *supra*.

Respectfully submitted,

DANIEL H. GREENBERG
Attorney for Petitioner

December 15, 1964

APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 137—September Term, 1964.

(Argued September 25, 1964 Decided November 17, 1964.)

Docket No. 29043

UNITED STATES OF AMERICA,

Appellee,

—v.—

ANTHONY CASTALDI,

Appellant.

Before:

LUMBARD, *Chief Judge,*
MOORE and SMITH, *Circuit Judges.*

Appeal from a judgment of conviction for contempt of court entered in the United States District Court for the Southern District of New York, Inzer B. Wyatt, *J.*, sitting without a jury.

Affirmed.

ROBERT M. MORGENTHAU, United States Attorney (Andrew M. Lawler, Jr., John A. Sprizzo, Assistant United States Attorneys, of counsel), *for appellee:*

DANIEL H. GREENBERG, New York, New York (Samuel W. Altman, Marvin Margolis, of counsel), *for appellant.*

MOORE, *Circuit Judge*:

Anthony Castaldi appeals from a judgment convicting him of criminal contempt of court. The conviction was based on his refusal to answer questions put to him before a Grand Jury in the Southern District of New York and before a District Judge on the ground that he might incriminate himself.

Castaldi had been indicted along with a score of co-defendants and co-conspirators for conspiring to violate the federal narcotics laws. After a trial in 1963 he was one of five acquitted, eleven others being convicted.[1] In February 1964 Castaldi was subpoenaed to testify before a federal grand jury investigating illicit narcotics traffic. At hearings in February, April and May 1964 he refused to answer all questions, some of which related to aspects of the conspiracy. On May 15th, at the Government's request, Castaldi was granted immunity from future prosecution and ordered to answer, under 18 U. S. C. A. §1406. On July 1st, his next appearance before the Grand Jury, and on July 2nd, before Judge Wyatt, he again refused to answer all questions. On notice and hearing as provided in Rule 42(b), Fed. R. Crim. P., Judge Wyatt found Castaldi guilty of disobedience of the Court's orders requiring him to answer the questions put to him before the

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[1] The convictions were later reversed and a new trial ordered. *United States* v. *Borelli*, 336 F. 2d 376 (2d Cir. 1964).

Grand Jury. Judge Wyatt sentenced him to two years' imprisonment or until further order of the Court, should he answer the questions before the end of the sentence or the discharge of the Grand Jury. Castaldi's request for a jury trial was denied.

Castaldi now contends that: (1) the prior acquittal operates to bar a contempt conviction based on a refusal to answer questions concerning in part the subject matter of the earlier proceeding; (2) he was constitutionally entitled to an indictment and trial by jury; and (3) the two-year sentence is constitutionally impermissible. We reject all three contentions.

The conspiracy acquittal, Castaldi argues, should bar his contempt conviction under principles of double jeopardy, *res judicata* and collateral estoppel. However, the acquittal in no way gave Castaldi permanent freedom to refuse to answer all questions relating to possible narcotics violations merely because they might have some connection with an earlier trial. Indeed, the Supreme Court held in both *Reina* v. *United States*, 364 U. S. 507 (1960) and *Piemonte* v. *United States*, 367 U. S. 556 (1961), that a prior conviction did not create a right to refuse to answer questions relating to the underlying crime. " 'The public has a right to every man's evidence.' " *Piemonte, supra*, at 559 n. 2. If three persons witness an offense—an innocent bystander, a suspect who is convicted, and a suspect who is acquitted—the acquitted suspect has no more right to keep silent than do the other two. See *Piemonte, ibid.* Because the contempt conviction is not the same offense as in the earlier conspiracy proceeding, double jeopardy plays no role here, just as it plays no role in the case of a prior conviction.

Similarly, the doctrines of *res judicata* and collateral estoppel both contemplate subsequent litigation involving claims and facts already once adjudicated. The only question in the contempt proceeding was whether Castaldi wrongly refused to obey court orders; not whether he conspired to sell narcotics.

Castaldi is not being retried. Nor does his acquittal establish as a matter of law his lack of knowledge concerning narcotics traffic as he claims. All that the Government was required to show was that it had complied with the statute. This it has done. See *Ullman* v. *United States*, 350 U. S. 422, 434 (1956) dealing with a similar statute, 18 U. S. C. A. §3486, 68 Stat. 745.

Castaldi next claims that he was entitled to an indictment and jury trial under the Fifth and Sixth Amendments to the Constitution. His arguments on these points involve constructions of the statutes which classify federal offenses and define criminal contempt (18 U. S. C. A. §§1 and 401). Briefly, he argues that the punishment for criminal contempt is in the court's discretion and might possibly exceed one year, that sentencing for more than one year makes an offense a felony, that a felony is an "infamous" crime, and that, therefore, there should have been an indictment and jury trial. This argument was made and rejected in *United States* v. *Green*, 356 U. S. 165 (1958), which upheld a three-year sentence. That principle was recently reaffirmed in *United States* v. *Barnett*, 376 U. S. 681, 692 (1964), which again ruled against a constitutional right to a jury trial in a criminal contempt case.

Castaldi does not have a statutory right to a jury trial. Congress has provided for a jury trial in only certain criminal contempt proceedings. See, e.g., 18 U. S. C. A. §§402, 3691, 3692; Civil Rights Act of 1964, §1101, 78 Stat. 267. But under all of these statutes no right to a jury trial exists with respect to contempts committed in the presence of the court. And that is what Castaldi is convicted of.

Lastly, we come to the claim that the penalty which may be imposed is limited to that for petty offenses, because of the absence of a jury trial. Castaldi cites footnote 12 in *United States* v. *Barnett,* 376 U. S. at 694-95, in which the Court added a "dictum" that "Some members of the Court are of the view that, without regard to the seriousness of the offense, punishment by summary trial without a jury would be constitutionally limited to that provided for petty offenses." But as we noted in *United States* v. *Harris,* 334 F. 2d 463 (2d Cir.), *petition for cert. filed,* 33 U. S. L. Week 3101, Sept. 22, 1964 (No. 526), the contempt in *Barnett* was not committed in the presence of the court and the contempt proceeding took place after compliance with the court order. Here, as in *Harris,* the contempt was committed in the court's presence and the proceeding preceded compliance. But cf. *Rollerson* v. *United States,* No. 17675, D. C. Cir., Oct. 1, 1964.

Moreover, the sentence has a purge clause by which Castaldi "carries the keys to freedom in his willingness to comply with the court's directive . . . " *United States* v. *Barnett,* 376 U. S. at 727 n. 6 (dissenting opinion of Black, *J.*), *id.* at 754 (dissenting opinion of Goldberg, *J.*). Sentences

similar to this were upheld in *United States* v. *Reina, supra; United States* v. *Testa,* 334 F. 2d 746 (3d Cir.), *cert denied,* 33 U. S. L. Week 3129 (U. S. Oct. 12, 1964); see *United States* v. *Rinieri,* 308 F. 2d 24 (2d Cir.), *cert. denied,* 371 U. S. 935 (1962).

Castaldi's attempt to distinguish *Harris* as arising under Rule 42(a), Fed. R. Crim. P., for summary contempts, whereas this case arose under Rule 42(b) for disposition on notice and hearing, is without merit. His refusal to answer was made in the presence of the court and would have justified a proceeding under Rule 42(a). If the sentence would be permissible then under *Harris,* it can hardly be made impermissible by the fact that the court chose to proceed under Rule 42(b), by which other additional protections were afforded.

The judgment appealed from is affirmed.

APPENDIX B

Constitutional Provisions, Statutes and Rule Involved

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . .

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation: . . .

TITLE 18, UNITED STATES CODE (1958 ed.)

§ 1. OFFENSES CLASSIFIED

Notwithstanding an Act of Congress to the contrary:

(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.

(2) Any other offense is a misdemeanor.

(3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense.

Appendix B—Constitutional Provisions, Statutes and Rule Involved

§ 401. Power of court

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

§ 1406. Immunity of witnesses

Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of—

(1) any provision of part I or part II of subchapter A of chapter 39 of the Internal Revenue Code of 1954 the penalty for which is provided in subsection (a) or (b) of section 7237 of such Code,

(2) subsection (c), (h) or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U.S.C., sec. 174), or

(3) the Act of July 11, 1941, as amended (21 U.S.C., sec. 184a), is necessary to the public interest, he, upon the approval of the Attorney General, shall make application

to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.

Federal Rules of Criminal Procedure

Rule 42. CRIMINAL CONTEMPT

* * * * *

(b) *Disposition Upon Notice and Hearing.* A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and de-

scribe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

APPENDIX C

Indictment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

62 Cr. 790

Filed, August 15, 1962

UNITED STATES OF AMERICA,

—v.—

FRANK BORELLI, ANGELO BUIA, ANTHONY CASTALDI, ANTHONY CICCONE, BENEDETTO CINQUEGRANO, ALBERT DI STEFANO, ALFRED EPPOLITO, THOMAS GARIBALDI, CARMINE LOCASCIO, ANGELO LOIACANO, JOSEPH MOGAVERO, ROSARIO MOGAVERO, VINCENT RENNA, GUISEPPE A. RUFFINO, MIKE SEDOTTO, ANTHONY SETTECASE, DAVID "Pop" SMITH, ROCCO SANCINELLA, HARRY TANTILLO and JOHN DOE, a/k/a MICKEY BLAIR, meaning thereby to describe a white male, approximately 51 years of age, 5'9", with greying black hair and dark complexion,

Defendants.

The Grand Jury charges:

1. From in or about January of 1950 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, FRANK BORELLI, ANGELO BUIA, ANTHONY CASTALDI, ANTHONY CICCONE, BENEDETTO CINQUEGRANO, ALBERT DI STEFANO, ALFRED EPPOLITO, THOMAS GARIBALDI, CARMINE LOCASCIO, ANGELO LOIACANO, JOSEPH MOGAVERO, ROSARIO MOGAVERO, VINCENT RENNA, GUISEPPE A. RUFFINO, MIKE SEDOTTO, AN-

THONY SETTECASE, DAVID "POP" SMITH, ROCCO SANCINELLA, HARRY TANTILLO and JOHN DOE, a/k/a MICKEY BLAIR, meaning thereby to describe a white male, approximately 51 years of age, 5'9", with greying black hair and dark complexion, named as defendants herein and Joseph Baione, Charles Campisi, Ugo Caneba, Salvatore Caneba, Jake Ciraulo, Charles Curcio, Charles Di Palermo, Sam Kass, Daniel Lessa, Gennaro Mancuso, Rocco Mazzie, Vincent Mazzie, Michael Monica, James Piccarelli, Richard Roe, a/k/a "Pete" meaning thereby to describe a white male, approximately 43 years of age, 5'6" weighing 150 lbs., with dark complexion, Jack Scarpulla, Salvatore Rinaldo, Guiseppe Ruffino, Joseph Seirra, Vincent Squillante, Joseph Valachi, named as co-conspirators but not as defendants herein, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other and with divers other persons to the Grand Jury unknown to violate Sections 173 and 174 of Title 21, United States Code.

2. It was a part of said conspiracy that the said defendants and co-conspirators would unlawfully, fraudulently, wilfully and knowingly import and bring large amounts of narcotic drugs into the United States from and through Italy and other countries to the Grand Jury unknown.

3. It was further a part of said conspiracy that the said defendants and co-conspirators would unlawfully, fraudulently, wilfully and knowingly receive, conceal, buy, sell and facilitate the transportation, concealment and sale of large amounts of narcotic drugs after said narcotic drugs

were imported and brought into the United States, knowing that the said narcotic drugs were imported and brought into the United States contrary to law.

4. It was further a part of said conspiracy that said defendants and co-conspirators would dilute, mix and adulterate said narcotic drugs prior to their distribution throughout the United States.

OVERT ACTS

In furtherance of said conspiracy and to effect the objects thereof, within the Southern District of New York and elsewhere, the defendants committed the following overt acts, among others:

1. In or about March of 1951 in the Southern District of New York the defendants HARRY TANTILLO and CARMINE LOCASCIO had a conversation in the Black Horse Inn on Market Street, New York, New York.

2. In or about May of 1951, in the Southern District of New York, the defendants, FRANK BORELLI, CARMINE LOCASCIO and co-conspirator Charles Curcio, had a conversation in the vicinity of 112th Street and Broadway, New York, New York.

3. In or about October of 1951, in the Southern District of New York, the defendants, BENEDETTO CINQUEGRANO and ROSARIO MOGAVERO had a conversation in the Black Horse Inn on Market Street, New York, New York.

4. In or about March of 1954, in the City of Flemington, District of New Jersey, the defendant ALBERT DI STEFANO, had a trunk in his possession.

5. In or about July of 1954, in the Southern District of New York, the defendants, JOSEPH MOGAVERO, CARMINE LOCASCIO and ANTHONY CASTALDI, had a conversation at the Howard Johnson Restaurant on Bruckner Boulevard near the Hutchison River Parkway, Bronx, New York.

6. In or about August of 1954, in the Southern District of New York, the defendants ANGELO BUIA and DAVID "Pop" SMITH had a conversation on 34th Street and First Avenue in New York, New York.

7. In or about August of 1954, in the Southern District of New York, the defendants, CARMINE LOCASCIO, ANTHONY CICCONE and ANTHONY CASTALDI, made a test in the vicinity of Second Avenue and 106th Street, New York, New York.

8. In or about May of 1955, the defendant GUISEPPE A. RUFFINO arrived in New York, New York, in the Southern District of New York from Italy.

9. In or about August of 1955, in the Southern District of New York, the defendants DAVID "Pop" SMITH, CARMINE LOCASCIO and JOSEPH MOGAVERO had a conversation at Walsh's Steak House at 24th Street and First Avenue, New York, New York.

10. In or about August 1955, the defendant VINCENT RENNA arrived in New York, New York, in the Southern District of New York, from Italy.

11. In or about August of 1955, the defendant, ANTHONY SETTACASE, had a trunk in his possession in Marlboro, New York.

12. In or about December of 1955, in the Southern District of New York, the defendant MIKE SEDOTTO, received a package in the vicinity of Bruckner Boulevard and Tremont Avenue, Bronx, New York.

13. In or about December of 1957, the defendants, Rocco SANCINELLA, JOSEPH MOGAVERO and ANGELO LOICANO, had a conversation at the Anchor Bar, 1469 Second Avenue, New York, New York, in the Southern District of New York.

14. In or about July of 1958, in the Southern District of New York, the defendant, ALFRED EPPOLITO, received $35,000 on Market Street, New York, New York.

15. In or about July of 1958, in the Eastern District of New York, the defendant, THOMAS GARIBALDI, had a package on his person in Astoria, Queens, New York.

16. In or about December of 1958, in the Southern District of New York, the defendant, JOHN DOE a/k/a MICKEY BLAIR, meaning thereby to describe a white male, approximately 51 years of age, 5'9", with greying black hair and dark complexion, had a package on his person in the vicinity of 180th Street and Broadway, New York, New York.

ROBERT M. MORGENTHAU
United States Attorney

.....
Foreman

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 767

ANTHONY CASTALDI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 15–20; R. 147–151) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 1964 (R. 152). The petition for a writ of certiorari was filed on December 17, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, because of petitioner's acquittal of conspiracy to violate the narcotic laws, he could not be

granted immunity and compelled to testify before a grand jury investigating possible violations of the narcotic laws related to the conspiracy with which petitioner had been charged.

2. Whether petitioner was constitutionally entitled to indictment and trial by jury in proceedings for contempt of court under Rule 42(b) of the Federal Rules of Criminal Procedure.

3. Whether the district court could constitutionally sentence petitioner to two years' imprisonment for contempt of court following a nonjury contempt hearing.

STATEMENT

In September 1963, a grand jury was convened in the Southern District of New York for the purpose of inquiring into possible violations of the narcotic laws (R. 80, 93–94, 109–110). That grand jury is still in session and is scheduled to expire in March 1965 (R. 142).

In December 1963, after a lengthy jury trial in the United States District Court for the Southern District of New York, petitioner and four co-defendants were acquitted of conspiracy to violate the Narcotic Drug Import and Export Act, 21 U.S.C. 174 (see R. 26–27), and eleven co-defendants, including Joseph Mogavero and Carmine Locascio, were convicted.[1] At the trial, the only direct evidence against petitioner came from an accomplice, Salvatore Rinaldo. He testified that in 1955 he met petitioner through Mogavero and Locascio

[1] On appeal, the convictions were reversed and a new trial ordered. *United States* v. *Borelli*, 336 F. 2d 376 (C.A. 2).

and was directed by Locascio to meet petitioner the next day. The following day petitioner introduced Rinaldo to one "Johnny", to whom, for about a year thereafter, Rinaldo delivered narcotics (see R. 26–27). Rinaldo also testified that during this period he, Mogavero and Locascio met petitioner in an apartment, and that all of them tested narcotics which were claimed to have been of poor quality (see R. 27).

In February, April, and May 1964, petitioner appeared before the grand jury under subpoena. After answering a few preliminary questions, he refused to answer the remaining questions on grounds of possible self-incrimination (R. 97–108). The questions propounded to petitioner before the grand jury involved the actors and events about which Rinaldo had testified at the trial; the nature of petitioner's employment or source of income, if any; petitioner's acquaintance with a number of individuals; and his knowledge or participation, if any, in the illicit narcotics traffic (R. 97–99, 101–104, 105–108).

On May 14, 1964, the United States Attorney filed in the district court an affidavit requesting the court to direct petitioner to testify and to produce evidence before the grand jury pursuant to a grant of immunity from prosecution under the provisions of the Narcotic Control Act of 1956, 18 U.S.C. 1406 (R. 93–95). The affidavit recited, *inter alia,* that petitioner's testimony was necessary and material to the grand jury's inquiry into possible violations of the narcotic laws and that the application was being made in good faith with the prior approval of the Attorney

General (R. 93–95). On May 15, 1964, after a hearing at which petitioner was represented by counsel, Judge Feinberg told the petitioner that he had absolute immunity from prosecution under 18 U.S.C. 1406 for anything he might disclose to the grand jury and that he could no longer refuse to answer on grounds of possible self-incrimination (R. 19–20). The judge ordered petitioner to reappear before the grand jury and to answer the questions which he had previously refused to answer (R. 23, 109–111).

On July 1, 1964, petitioner reappeared before the grand jury and refused to answer, on grounds of possible self-incrimination, the questions which he had been directed to answer (R. 112–116). On the following day, the grand jury, petitioner and counsel for each side appeared before District Judge Inzer Wyatt (R. 117, 118). Judge Wyatt said that he was not prepared to entertain or conduct a contempt proceeding at that time and that, instead, he would give petitioner "another chance" to answer the questions (R. 120–122). The court told petitioner that he could not rely upon the privilege against self-incrimination because he had "absolute immunity" from prosecution for anything he might say or disclose before the grand jury (R. 122–123). After directing petitioner to answer each question, the court propounded to petitioner the same questions which petitioner had previously refused to answer before the grand jury; petitioner again refused to answer on grounds of possible self-incrimination (R. 123–129).

Later that day, Judge Wyatt signed an order directing petitioner to show cause why he should not be adjudged in contempt of court for his refusal to answer the questions before the grand jury on July 1, 1964, and before the court on July 2, 1964 (R. 3). An affidavit filed by petitioner's counsel recited that the questions propounded to petitioner in each case were improper because they were either not designed to aid the grand jury's inquiry or because they conflicted with the petit jury's not-guilty verdict in the 1963 trial (R. 26–31). Petitioner demanded a trial by jury (R. 30). These points, including the demand for a jury trial, were repeated at the contempt hearing on July 8 and 9 (R. 55–73). Counsel also argued that petitioner's interrogation violated his constitutional protection against double jeopardy (R. 74–77).

The court found petitioner guilty of criminal contempt for his willful disobedience of the court order directing him to testify before the grand jury and for his wilful disobedience of the court order on July 2, 1964, "directly and in the actual presence of the Court" (R. 83). When the court asked government counsel whether he had anything to say on the question of penalty, counsel said, in part (R. 84–85):

> * * * I want to make this reference so the record will be perfectly clear. Castaldi's appearance before the grand jury on these occasions this year was caused only in the most minor way by the trial that he was a defendant in last year in this court. Castaldi has been under investigation by the Federal Bureau of Narcotics for approximately, and at least 15

> years, before the Government * * * ever heard of Rinaldo, the witness who testified against him.

Government counsel also stated that, according to testimony given by one Joseph Valachi before a committee of the United States Senate, petitioner was a member of the Luchesi "family", many of whose members had been convicted of violations of the Federal narcotic laws, so that there was reason to believe he had knowledge of the operation of the narcotics traffic (R. 85–86). After hearing from counsel for the petitioner (R. 86–89) and extending to petitioner his right of allocution (R. 89), the court said (R. 89):

> Mr. Castaldi, I want to make it clear that the sentence of the Court is not intended so much by way of punishment as it is intended solely to secure for the grand jury answers to the questions that have been asked you. I am therefore going to provide in the sentence that you may at any time be released from confinement provided you answer the questions.

The court then sentenced petitioner to two years' imprisonment or to serve until the further order of court should the petitioner answer before the grand jury the questions which appear on the record and which he was ordered to answer (R. 89, 131). The court said that if petitioner answered the questions prior to the expiration of his sentence or to the discharge of the grand jury, the further order of the "Court may be made terminating the sentence of imprisonment" (R. 90). Petitioner was thereafter re-

leased on bail pending appeal, and he is presently free on bail.

DISCUSSION

1. Petitioner contends (Pet. 8–10) that inasmuch as he had been acquitted in 1963 on charges of conspiring to violate the narcotic laws, he could not be compelled, under the immunity provisions of the Narcotic Control Act of 1956, to testify before a grand jury investigating possible related violations of the narcotic laws. The fact that petitioner was found not to have been criminally implicated in the particular conspiracy charged in the earlier indictment did not, however, establish that he had no information which would aid the grand jury with respect to other violations of the narcotic laws. A witness who is not guilty of a crime is often able to give valuable information, and petitioner was called as a witness, not as a potential defendant. Nor was the present grand jury investigating the case which had been tried; it was inquiring into other possible offenses on which the prior testimony might have some bearing.

A person who has been convicted of a narcotics offense may be compelled under 18 U.S.C. 1406 to give evidence before a grand jury. *Reina* v. *United States,* 364 U.S. 507; *Piemonte* v. *United States,* 367 U.S. 556. Hence it is clear that mere interrogation concerning narcotics transactions of a person who has been once tried for a narcotics offense does not violate any constitutional protection. This principle is no less applicable to an acquitted defendant than to a convicted one. In either instance, a subsequent prose-

cution for the same offense with which the witness was previously charged would violate the Double Jeopardy Clause, but inquiry concerning either that offense or other related crimes is permissible. And once immunity is extended under Section 1406, the witness' position is no different from that of any person who has never been charged with an offense. If a question erroneously "assumes the truth" (Pet. 9) of the earlier charge made against the witness, he may deny it in his answer. And if this assumption is, in fact, correct (notwithstanding his acquitttal), both the prior trial and the immunity conferred upon the witness protect him against incriminatory use of a truthful answer.

2. There is no merit to petitioner's claim (Pet. 10–12) that he was constitutionally entitled to indictment and trial by jury on the contempt charges. This contention was recently rejected by this Court (*United States* v. *Barnett*, 376 U.S. 681; *Green* v. *United States*, 356 U.S. 165), and presents no issue requiring further review. As shown by the Statement, *supra*, the procedure prescribed by Rule 42(b), F.R. Crim. P., was used in this case, and petitioner had ample notice of the charges and opportunity to defend at the hearing before the district court. Petitioner was not entitled to a jury trial under applicable statutory provisions, as the court below correctly held (Pet. App. 19). See 18 U.S.C. 402, 3691.

3. The sentence in this case contains an explicit provision that it will be reconsidered if petitioner testifies before the grand jury (R. 131). To that ex-

tent it is different from the sentence in *Harris* v. *United States*, No. 526, this Term, certiorari granted, December 14, 1964, where the judge merely indicated orally that he would consider reducing the sentence if the defendant testified.[2] However, unless petitioner testifies before the grand jury expires in March 1965, his two-year sentence will become fixed. Hence we suggest that it would be appropriate to defer action on this petition pending determination of the question, which is involved in *Harris*, as to the power of the court to fix a contempt sentence in excess of that for a petty offense.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
RICHARD W. SCHMUDE,
Attorneys.

JANUARY 1965.

[2] The fact that the judge in this case proceeded under Rule 42(b) rather than holding petitioner in contempt summarily under Rule 42(a) is of no significance. The judge explicitly found not only that petitioner disobeyed an order of the court before the grand jury, but that petitioner disregarded the order of July 2 "directly and in the actual presence of the Court" (R. 83). Hence, if presence before the court is significant with respect to the length of sentence, this factor is present in this case as well as in *Harris*.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 33

ANTHONY CASTALDI,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

DANIEL H. GREENBERG
Counsel for Petitioner
110 East 42nd Street
New York, N. Y. 10017

32 CASE PRESS INC., 421 Hudson St., N.Y.—ORegon 5-4540

IN THE

Supreme Court of the United States

October Term, 1964

No. 767

ANTHONY CASTALDI,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

REPLY MEMORANDUM FOR PETITIONER

Statement

This memorandum is respectfully submitted in reply to the Memorandum for the United States submitted in this cause. In its memorandum the United States does not oppose the grant of certiorari herein, stating that the issue in this case is the same as in the case of *Harris* v. *United States,* No. 526, this Term, certiorari granted, December 14, 1964, as to the district court's sentencing power in contempt cases. The Solicitor General has suggested that in this case "it would be appropriate to defer action on this petition pending determination of the question, which is involved in *Harris,* as to the power of the court to fix a contempt sentence in excess of that for a petty offense" (p. 9).

For the reasons set forth hereinafter, it is believed that certiorari should be granted in this cause, on the questions presented in the petition, and that this case should be ordered briefed and argued along with the *Harris* case.

Discussion

The undersigned counsel for petitioner Castaldi was appellate counsel for petitioner in the *Harris* case. He was retained by Moses Polakoff, Esq., of the New York bar, the attorney of record for Harris, and he wrote the briefs and argued the appeal in the *Harris* case before the Court of Appeals. He wrote the petition for certiorari and reply memorandum in the *Harris* case. He was retained for all phases of the appeal procedures in said case. He has had a number of cases both in the Court of Appeals and this Court on various aspects of federal contempt cases. He was retained in this case by petitioner Castaldi by reason of the fact that he was appellate counsel in the *Harris* case and in light of his knowledge and experience in federal contempt cases.

When certiorari was granted in the *Harris* case, it was understood and agreed that the undersigned would write the brief and orally argue that case before this Court. Thereafter, and for reasons which have never been made clear to the undersigned, and in which this Court would probably not be interested, petitioner Harris discharged his counsel of record, Moses Polakoff, Esq. and accordingly, without any notice to him, the undersigned ceased to be connected with the *Harris* case. As a result, the opportunity for the undersigned to write the brief and present oral argument before the Court in the *Harris* case was lost.

In several essential respects this case differs from *Harris*. Firstly, here the contempt hearing was conducted under Rule 42(a), F.R.Cr.P., rather than Rule 42(b), as in the *Harris* case. The Court of Appeals considered this to be a distinction without a difference, stating that Castaldi's contempt occurred in the court's presence, before compliance with the court's order, and that he could have been sentenced summarily under Rule 42(a). Secondly, unlike the Harris sentence of one year, the sentence of two years in this case contained a limited purge clause, limited to the life of the grand jury before whom Castaldi appeared. This in effect places a premium on a man exercising his right of appeal, notwithstanding the merit of the appeal, for if ultimately he is unsuccessful in urging Constitutional and legal arguments (as here), ostensibly he loses his right to purge his contempt and reduce his jail sentence. Purge clauses, such as the one in this case, should be reviewed by this Court.

Counsel is aware of the practice of this Court often to defer action on pending petitions for certiorari while considering on the merits one case involving some of the same questions of law. Such practice helps to reduce the enormous volume and burden of pending cases before the Court. However, under the circumstances of this case it is believed that certiorari should be granted and this case should be fully heard on the merits. Counsel is informed that there are a great many cases involving the same questions of federal contempt law on their way to this Court. Many of them are originating in the same court from which both *Harris* and this case came, that is, the Southern District of New York. The Court therefore may very well wish to consider a brief and hear oral argument from the same counsel who handled all of the appeal procedures up to this point in both *Harris* and this case.

Petitioner wishes also to advise the Court that the record in this case has already been printed in sufficient copies to supply the requirements of the rules of this Court. All that need be added to the printed record is the proceedings before the Court of Appeals. Counsel is prepared to write the petitioner's brief and to argue this case before the Court at the same time as the *Harris* case is argued. Thus there will be no delay if both cases are heard at the same time. We are informed that *Harris* is presently scheduled for argument during the week of March 29, 1965.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted on all questions presented in this case, and this case should be set for full argument before the Court at the same time as the *Harris* case.

Respectfully submitted,

DANIEL H. GREENBERG
Counsel for Petitioner

January 20, 1965.

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Supreme Court of the United States

October Term, 1964

No. [redacted] 218

CARMINE P. TRAMUNTI,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PHILIP R. EDELBAUM
Attorney for Petitioner
250 Broadway
New York, N. Y. 10007

32 CASE PRESS INC., 421 Hudson St., N.Y.—ORegon 5-4540

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Supreme Court of the United States

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No.

CARMINE P. TRAMUNTI,

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—v.—

UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The District Court rendered an informal "opinion" and it announced findings, which are unreported and are printed at 70a* et seq. The opinion of the Court of Appeals, printed in Appendix A hereto, *infra,* is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered on April 5, 1965 (Appendix B hereto, *infra*). By order of the Honorable Mr. Justice John M. Harlan, the time within which to file a petition for a writ of certiorari in this case

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* " a" refers to the printed "Appellant's Appendix", nine extra copies of which are filed herewith.

was extended to and including June 4, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

After expiration of the fifteen-day period prescribed by the Rules of the Court of Appeals for the filing of a petition for rehearing, a motion was made in that Court by the within petitioner for leave to file a late-filed petition for rehearing; annexed to said motion were copies of the proposed petition for rehearing (Appendices C and D hereto, *infra*). The motion was denied by the Court of Appeals on June 1, 1965 (Appendix E hereto, *infra*). Later in this petition we explain the bearing which the proposed petition for rehearing may have upon the issues of this certiorari application.

Questions Presented

Petitioner was convicted, without a jury trial, of contempt of court for refusal to answer questions before a Federal Grand Jury when ordered to do so by the District Court after a grant of immunity under 18 U.S.C. §1406, and he was sentenced to imprisonment for one year with a purge provision. The questions are:

1. Was petitioner denied his constitutional right to a jury trial, was the sentence excessive, and does not the case in these respects alone merit the granting of certiorari? Cf. *Al Harris* v. *United States*, certiorari granted December 14, 1964, 379 U.S. 944 (No. 526).

2. Was petitioner denied his constitutional right to assistance of counsel in that the purported conferral of immunity was made during the concededly unavoidable ab-

sence of his attorney upon a tour of active military duty? Was this defect cured by a subsequent purported re-conferral of the immunity in the presence of petitioner's attorney?

3. Was the purported immunity invalid because of failure to comply with the Attorney General's letter of approval, in that the letter was conditional upon petitioner's renewing his refusal to testify and the United States Attorney went ahead with the original immunity-conferral proceedings without any further attempt to have petitioner testify? (This question was attempted to be raised below by a proposed late-filed petition for rehearing which the Court of Appeals denied petitioner permission to file.)

4. Was the purported conferral of immunity as subsequently purportedly re-conferred, more than three months later, invalid by reason of the staleness of the Attorney General's approval, as to which no attempt had been made to obtain a new approval, and a new Attorney General (or acting Attorney General) having taken office in the interim? (This question was attempted to be raised below by a proposed late-filed petition for rehearing which the Court of Appeals denied petitioner permission to file.)

5. Was petitioner denied due process of law in that the questions he refused to answer were not relevant to the Grand Jury inquiry conducted pursuant to the immunity power which was herein invoked, namely, the narcotics immunity provision of 18 U.S.C. §1406? Where a Grand Jury witness has answered each and every question relating to narcotics, and seemingly also each and every question relating to alleged possible connections between narcotics

and gambling, may he be convicted of contempt solely for refusal to answer questions which he was reasonably entitled to interpret as relating distinctly and exclusively to gambling? Does not the use of the narcotics immunity statute in such circumstances amount to an unconstitutional ruse to get around the lack of an immunity statute for the subject matter of gambling in itself?

6. Was petitioner denied the benefit of the rule of reasonable doubt, as well as a fair trial based upon evidence received and considered in a proper judicial manner, in that petitioner and his attorney were denied the right to see the minutes of the Grand Jury on the questioning of petitioner in its entirety, in that further the Trial Court itself declined to look at any part of the Grand Jury minutes except the parts relating to petitioner's refusal to answer, and in that further the defense contended that it was the Government's burden to prove affirmatively that petitioner was guilty of wilfull contempt upon the Grand Jury record read in its entirety? Where a Grand Jury witness maintains that he has fully answered each and every relevant and material question, that he intended no contempt, and that a perusal of the Grand Jury minutes in their entirety is essential to overcome these defenses, is it not a denial of due process of law to adjudge the witness guilty of contempt and to sentence him to one year's imprisonment without a jury trial upon such a truncated "trial record"?

Constitutional Provisions and Statutes Involved

The case involves the Fifth Amendment (due process of law and self incrimination) and the Sixth Amendment (jury trial and assistance of counsel) of the United States Constitution.

It also involves 18 U.S.C. §401 (contempt), F.R. Crim. Proc. 42(b) (criminal contempt upon notice and hearing) and 18 U.S.C. §1406 (narcotics immunity). The text of these provisions is set forth in full in the opinion of the Court of Appeals which is printed in Appendix A hereto, *infra*.

Statement of the Case

This petition seeks review of a judgment of the United States Court of Appeals for the Second Circuit entered on April 5, 1965 (Appendix B hereto, *infra*) which affirmed a judgment of the United States District Court for the Southern District of New York entered on December 2, 1964 (130a) convicting the defendant of criminal contempt, after trial to the Court without a jury, and sentencing him to one year's imprisonment (with a purge provision—*infra*) upon the finding that he willfully disobeyed orders of the Court to answer certain questions before a Grand Jury on November 12, 1964 after conferral of immunity under 18 U.S.C. §1406.

Petitioner had been questioned by the Grand Jury three times earlier in 1964 (February 13, April 23 and May 7) concerning narcotics, gambling, and various alleged criminal activities of certain much-publicized personages such as Luciano, the "Lucchese Family", etc., and he had declined

to answer on the ground of the privilege against self incrimination (113a-123a).

Under date of July 23, 1964 Attorney General Robert F. Kennedy sent a letter to United States Attorney Robert M. Morgenthau (S.D.N.Y.) granting approval (which Mr. Morgenthau had evidently requested)* for an application to the Court for an immunity order pursuant to 18 U.S.C. §1406 (101a-102a). Mr. Kennedy's letter recited that it was his understanding that Mr. Morgenthau was conducting a narcotics investigation involving associates of Thomas Lucchese "as set forth in Title 18, Section 1406, United States Code"; that "Carmine Tramunti has information which would be necessary to the successful completion of that investigation"; that it was Mr. Morgenthau's intention to recall Tramunti to testify "before a Grand Jury inquiring into this matter"; and that Tramunti is "expected to refuse to testify" on grounds of constitutional privilege (101a). Mr. Kennedy's letter further stated that he was in accord with Mr. Morgenthau's judgment that the testimony of Tramunti is necessary to the public interest, and concluded with what we respectfully contend was a *conditional* approval for an immunity-conferral application to the Court, to wit, "should this witness claim said privilege against self incrimination, therefore, you are authorized to make application * * *" for an immunity order (101a-102a).

The United States Attorney, under date of July 31, 1964, without having first recalled Tramunti before the Grand Jury, applied for an immunity order (2a, 98a-100a, 105a-

* The record herein contains no indication of whether Mr. Morgenthau's request for approval was written or otherwise.

112a). The application was made before District Judge Lloyd F. MacMahon on August 4, 1964 (105a-112a). Tramunti's attorney, Philip R. Edelbaum, had previously informed the United States Attorney that he would be unable to appear with Tramunti until after August 15, 1964 because he was departing on a two-weeks tour of active duty in the United States Army Reserve (129a). At the proceedings before Judge MacMahon on August 4, 1964—which the Government insisted on pursuing despite the legitimate and unavoidable absence of Tramunti's counsel—Tramunti read to the Court a letter from his attorney, Mr. Edelbaum, advising him to refuse to answer any Grand Jury question during the attorney's absence on military duty (110a-111a). The United States Attorney and the Court nevertheless saw fit to press to completion an immunity conferral on the day in question (August 4, 1964); however, matters were not pushed so far on that day as to require the witness to proceed with the compulsory testimony, this being deferred because of the absence of the witness' attorney (111a-112a). The questions which the Government wanted Tramunti to answer were placed upon the record during the aforementioned proceedings before Judge MacMahon on August 4, 1964 (106a-110a). Throughout the latter proceeding the United States Attorney and the Court seem to have taken it for granted that there existed a valid approval by the Attorney General for the immunity application, and, needless to say, Tramunti was hardly in a position to discern the contrary (105a-112a). At the conclusion of the August 4 proceedings, and after "witness leaves room", the Court directed that the immunity application and the minutes of that day's proceedings be sealed (112a). As will appear, these sealed papers were not to become

available to Tramunti's counsel until certain subsequent proceedings (*infra*) on November 10, 1964.* Judge MacMahon's formal immunity order is printed at 103a-104a.

The matter remained in *status quo* until November 10, 1964, when Tramunti was recalled before the Grand Jury, was questioned pursuant to Judge MacMahon's immunity order of August 4, 1964, and again declined to answer (12a, 15a). Later on that same day Tramunti was brought before District Judge Inzer B. Wyatt, in the presence of the Grand Jury—Tramunti's attorney now also being present (12a-21a). On that occasion Tramunti's attorney informed Judge Wyatt about his having been absent on August 4, 1964, and he challenged the relevancy of any narcotics questioning of Tramunti, offering to show that Tramunti had never been connected with narcotics (16a-20a). The Court stated that "as a matter of law, I am prepared to rule that when the United States Attorney makes a decision that the testimony of this witness, Mr. Tramunti, is necessary, and when there is an approval of the Attorney General, that is the end of it" (20a). The papers which had been sealed by Judge MacMahon on August 4 were made available to Tramunti in the aforesaid proceeding on November 10 (14a). Upon request by Tramunti's counsel for an opportunity to study the relevancy of the Grand Jury questions, the matter was adjourned until November 12, 1964 (20a-21a).

At the resumed proceedings on November 12 (22a et seq.) Judge Wyatt announced that he was not at that stage conducting a contempt proceeding as yet but was exploring

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* Tramunti's attorney had not seen the immunity application prior to sometime in October, 1964, when he was informally shown a copy by Assistant United States Attorney Tendy; he had no advance knowledge of a proposed immunity conferral; he did not see the sealed minutes of August 4, 1964 until November 10, 1964 (*infra*).

whether additional persuasion might prevail upon Tramunti to answer the questions which Judge MacMahon had directed him to answer (25a). Upon inquiry from Tramunti's counsel Judge Wyatt at first said that he was bound by Judge MacMahon's ruling as to the relevancy of the questions, but when counsel reminded the Court that he had not been present in the proceedings before Judge MacMahon, Judge Wyatt stated that he had examined the questions and "I make an independent determination" that they are relevant (25a). After further colloquy on the issue of relevancy of the questions (25a-27a) the Court read to Tramunti each question and asked him whether he was prepared to answer (30a-36a). It is of interest that, in this latter interrogation by the Court on November 12, 1964, Tramunti stated that he was prepared to answer practically all of the questions, including each and every question relating not only to narcotics but also to his alleged relations with various alleged notorious "Cosa Nostra" figures, excepting only insofar as the questions related distinctly or isolatedly to gambling (*ibid*). Among the questions which Tramunti said he would answer were whether he had "any source of income," whether he was "a member" of an alleged Thomas Lucchese group "involved in various illegal activities" including narcotics, whether he knew anything about alleged membership in that group of various named persons, whether "you know of anybody that does participate in the narcotics traffic", what his own contacts with Luciano had to do with narcotics, whether he knew anything about the relations between Luciano and Lucchese including narcotics or between Luciano or Lucchese and several named persons accused of narcotics activity, whether certain persons (Cavallieri and Rosato) who were alleged to be "closely connected

with you in gambling activities" and "also known to be active in the narcotics field" were the subjects of any knowledge by Tramunti concerning their narcotics activities, whether Tramunti "ever had any gambling contact with any one of these individuals", etc. (31a-36a).

Immediately after the above interrogation (November 12, 1964) Tramunti was taken back before the Grand Jury, where he refused to answer those questions which he had told Judge Wyatt he would refuse to answer, and later that same day the proceedings were resumed in the presence of the Court, at which time the Court was informed of those refusals (36a-37a). Judge Wyatt thereupon directed the United States Attorney to submit an order to show cause for contempt on November 19, 1964 (37a). Such an order to show cause was obtained (November 17) (4a), it being alleged in the supporting affidavit that Tramunti had refused to answer the following five questions (7a):

"(a) Q. When were you down in Florida last?

(b) Q. Isn't it a fact that you ran a fairly successful dice game down in Dade County?

(c) Q. Who's Allie Harris?

(d) Q. How is the dice game going up in Harlem?

(e) Q. Cavallieri and Rosato are alleged to be connected with you in gambling activities, particularly in dice games. These two individuals are also known to be active in the narcotics field. Have you ever had any gambling contact with any one of them?"

(In connection with the last of the above quoted questions it will be noted that Tramunti's alleged refusal to answer does not seem to comport with his statement to Judge Wyatt

on November 12, 1964 that he was willing to answer such a question (35a-36a). This is further discussed *infra*, where we take up the question of whether Tramunti was properly convicted of contempt without a perusal and consideration of his allegedly contemptuous Grand Jury testimony of November 12, 1964 in its entirety.)

We turn now to the proceedings upon the return of the order to show cause for contempt (November 19, 1964) (38a-50a). Tramunti's counsel laid special stress on the need for an examination of the allegedly contemptuous Grand Jury testimony in its entirety, arguing that since (as the defense contended) the issue of relevancy—i.e., the relevancy of questions exclusively concerning gambling in a Grand Jury investigation ostensibly devoted to narcotics —of necessity remained in the case as part of the Government's burden of proving wilfull contempt beyond a reasonable doubt, the Grand Jury testimony in its entirety must be examined to see whether Tramunti had or had not in fact fully and fairly answered all questions having a reasonable connection with narcotics (39a-40a, 41a-48a). The Court took this request under advisement and adjourned the contempt proceedings for one week (49a-50a).

The Court also, on November 17, denied a defense request for a jury trial (47a).

The contempt proceedings were resumed on November 24, 1964 (51a-75a). Defense counsel renewed the contention as to relevancy of the questions, urging that the Government's invocation of the narcotics immunity statute to inquire into Tramunti's alleged gambling activities was a mere ruse, and noting that another Grand Jury in the Southern District had sought the same gambling informa-

tion from one Al Harris or Allie Harris through resort (in that instance) to the Communications Act immunity provision—i.e., Tramunti was being asked about gambling activities with Harris, and Harris had been asked about gambling activities with Tramunti (54a-55a—see counsel's similar contentions at the November 19 proceedings, *supra*, 43a). The Court did acknowledge that the relevancy issue was open as a defense in the contempt proceedings (56a), but it denied the defense request (which it had taken under advisement on November 19) for examination and consideration of the November 12 Grand Jury minutes in their entirety; indeed the Court finally ruled that it would not even look at those minutes itself, deeming that it need not go beyond the specific question-and-answer refusals (60a-62a, 65a-69a). Further, overruling the defense contention that a full scrutiny of those complete minutes had to be made as part of the requirements of the Government's burden of proof, the Court in effect shifted the burden to the defense, saying "I am giving the defendant right now, the chance to present any evidence that would indicate that he did answer these questions" (68a).

The Government's proof on the contempt charge (as introduced before Judge Wyatt on November 24, 1964) consisted of (1) the Grand Jury subpoena, (2) a stipulation that the Grand Jury was duly constituted, (3) the immunity application of Mr. Morgenthau and the approval letter of Mr. Kennedy,* (4) Judge MacMahon's immunity order, (5) the transcript of the proceedings of August 4, 1964 be-

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* Defense counsel stated that he had no objection to the admission of these last mentioned items (58a), but we urge *infra* that if Mr. Kennedy's approval letter was not complied with, the defect in the immunity-conferral proceedings partakes of a jurisdictional character.

fore Judge MacMahon, (6) transcripts of the Grand Jury proceedings earlier in 1964 (pre-immunity) where Tramunti had invoked the privilege, (7) a transcript of portions of the Grand Jury proceedings of November 10 and 12, 1964 where Tramunti refused to answer questions on gambling after Judge Wyatt's direction to do so, (8) transcripts of the Court proceedings of November 10 and 12, 1964, and (9) the application for the contempt order to show cause; with these items the Government rested (57a-64a).

The defense moved to discharge the order to show cause and to dismiss the proceedings on the ground, again, of failure to produce the Grand Jury minutes of November 12, 1964 in their entirety (66a-69a, 70a-71a). The defense also further argued the issue of relevancy (71a-74a),* and the issue of denial of the right to counsel (69a-70a). (It will of course be borne in mind that running through the entire defense contention as to relevancy and the need to examine the Grand Jury minutes of November 12 in their entirety was the theme that the Government had not proved wilfull contempt beyond a reasonable doubt.)

The Court at the conclusion of the above mentioned contempt proceeding of November 24, 1964 took the case under advisement (71a, 75a). On December 2, 1964 the proceedings were resumed (75a-95a). Upon a defense request for a stipulation that the well-known "Cosa Nostra" informer Valachi in testifying before the McClellan Committee had

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* In this connection it was stipulated that the Al or Allie Harris earlier mentioned as having been interrogated about the same gambling activities here involved (before another Grand Jury and under another immunity statute) was the same Harris who was the defendant in *United States* v. *Al Harris*, 334 F. 2d 460 (C.A. 2 1964)—this being the case in which certiorari was granted on December 14, 1964, 379 U.S. 944 (No. 526).

mentioned Tramunti only with respect to dice games and not narcotics, the Court stated that it would so assume for the purposes of this case (75a-76a). The Court then announced its findings, rejecting all of the above described defense contentions,* and it sentenced Tramunti to imprisonment for one year as earlier noted with a purge provision operative until the expiration of the sentence or the discharge of the Grand Jury, whichever might first occur (76a-90a, 130a-131a).

In affirming the conviction the Court of Appeals likewise rejected all of the defense contentions,** ruling that the proceedings before Judge Wyatt had cured the claimed invalidity of the proceedings before Judge MacMahon in the absence of Tramunti's counsel, that the issues as to jury trial and excessive sentence in the absence of jury trial were without merit in view of *United States* v. *Harris*, 334 F. 2d 460 (C.A. 2, 1964) (in which certiorari had been granted at the time of the Court of Appeals' decision herein), that the questions on gambling were proper and relevant because "the information sought dealt directly with the possible financing of narcotics activity by an identified criminal organization through moneys derived by other criminal activities, in this case organized gambling", and that the refusal to open up the Grand Jury minutes was not error because the refusals to answer and the relevancy of the questions involved were established and because Tramunti knew whether he had in fact answered other similar questions (Appendix A hereto, *infra*).

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* The defense had not raised the issues as to the non-compliance with or staleness of the Attorney General's letter of immunity-approval.

** Again, the issues relating to the Attorney General's letter of approval were not raised in the appeal.

After the expiration of the time allowed by the rules of the Court of Appeals to petition for rehearing, the attention of Tramunti's attorney was called to the points as to a possible failure to comply with the conditions in Attorney General Kennedy's letter of immunity-approval (i.e., that if Tramunti again refused to testify the immunity was approved), and the possible staleness of the Attorney General's approval which had been given on July 23, 1964 whereas Judge Wyatt's apparent ratification of Judge MacMahon's immunity order of August 4, 1964 did not occur until November 12, 1964, which was after Attorney General Kennedy had resigned his office. These points, which had not been raised previously, were sought to be raised in the Court of Appeals by a late-filed petition for rehearing and a motion for leave to file such petition. On June 1, 1965 the Court of Appeals denied the motion for leave to file such late-filed petition for rehearing. The motion papers are printed in Appendix C hereto *infra*, the proposed petition for rehearing is Appendix B hereto *infra*, and the order denying leave to file is Appendix E hereto *infra*.

Reasons for Granting the Writ

1. The denial of the defense request for a jury trial in this criminal contempt proceeding, and the imposition of a one-year prison sentence in this non-jury proceeding, are in themselves justification for certiorari, since the issues thus brought forward are indistinguishable from those which were deemed to merit certiorari in *Al Harris* v. *United States*, 379 U.S. 944 (No. 526). While *Harris* involved Rule 42(a) F.R. Crim Proc., and our case involves a Rule 42(b) proceeding, this does not seem to us to create a significant

distinction in the light of *United States* v. *Barnett*, 376 U.S. 681, 695, n. 12, or in the light of the doctrinal considerations as to jury trial for criminal contempt which appear to have dictated the granting of certiorari in *Harris*.

2. In the peculiar complex of the circumstances in this case relating to (1) the right to assistance of counsel in connection with the immunity conferral and (2) Attorney General Kennedy's letter of immunity approval, an important issue meriting certiorari is presented in the interests of preserving both the constitutional right to counsel and the privilege against self incrimination. Tramunti did not have counsel at the immunity conferral proceedings on August 4, 1964 before Judge MacMahon. Contrast *Corona* v. *United States*, 250 F. 2d 578, 579 (C.A. 6 1958), cert. denied 356 U.S. 954, rehearing denied 356 U.S. 978; *United States* v. *Pagano*, 171 F. Supp. 435, 437 (S.D.N.Y. 1959)—in both of which cases it was noted that counsel was present at the immunity-conferral proceedings.* Thereafter, more than three months elapsed before anything further was done inthis case, the minutes of the August 4 proceeding before Judge MacMahon remaining sealed until November 10. Since Tramunti's attorney had neither Mr. Morgenthau's application nor Attorney General Kennedy's letter of approval prior to the August 4 proceeding or indeed until October (and then only in an informal setting), it is understandable that the delay and the continuing unavailability of the sealed papers, dulled counsel's alertness, at the resumed proceedings from November 10 on, to

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* Cf. also *In re Bart*, 304 F. 2d 631 (C.A.D.C. 1962) and *In re McElrath*, 248 F. 2d 612, 617 (C.A.D.C. 1957), emphasizing the right to proper notice and hearing in immunity conferral proceedings.

anything in the immunity procedure situation except the issue of the relevancy of the Grand Jury question. Our efforts to incorporate into the record the after-discovered issues as to the failure to comply with the condition in the Attorney General's letter—that Tramunti should again refuse to testify before immunity were conferred—and as to the staleness of the Attorney General's approval, failed when the Court of Appeals denied our motion for leave to file a petition for rehearing out of time. It seems to us that the importance of preventing slack immunity procedures, that is, the importance of preventing slack methods of overriding the constitutional privilege against self incrimination, is of jurisdictional or at least quasi-jurisdictional dimensions. This, combined with the factor of the at least dubious quality of the procedures in this case in regard to the right to assistance of counsel, impels us to urge that neither the failure of counsel to lodge the points referred to upon the record below nor the supposed ultimate ratification by Judge Wyatt of Judge MacMahon's immunity order, should prevail to dispose of these points. While Judge Wyatt's "ratification" of the immunity order did occur after Tramunti had once again (on November 10, 1964) refused to answer the Grand Jury's questions (so that thereby, the Government might argue, the condition in Attorney General Kennedy's letter was complied with), this last mentioned refusal was in the setting of an already existing imunity order which we claim was invalid; that is, the particular Grand Jury session of November 10 to which we refer, being a "compulsory testimony" session under an invalid "compulsory testimony" order, could not legally or constitutionally serve to advance the processes of appropriate immunity conferral and derivative prosecution for con-

tempt. In any event, there remains the matter of the staleness of Attorney General Kennedy's approval (July 23, 1964) as of November 10, 1964 and the ensuing proceedings. Cf. Mr. Justice White's concurring opinion in *Murphy* v. *Waterfront Commission*, 378 U.S. 52 (at 12 L. Ed. 2d 678 n. 4), where the importance of express approval of the Attorney General in each case of immunity conferral is emphasized with respect to the immunity provision in 18 U.S.C. §3486, Mr. Justice White citing also 18 U.S.C. §1406 in this same respect. Cf. also the emphasis upon careful immunity procedures in *In Re Bart*, 304 F. 2d 631 (C.A.D.C. 1962); and in Mr. Justice (then Chief Judge of the New York Court of Appeals) Cardozo's well-known opinion in *Doyle* v. *Hofstader*, 257 N.Y. 244, 177 N.E. 489 (1931).

It is by no means unrealistic to suggest that if the Attorney General—whether Mr. Kennedy or his successor who had assumed the office prior to the resumption of proceedings in this case in November 1964—had been apprised of the turn of events consisting of Tramunti's having finally answered all of the narcotics questions, there might well have been a policy decision not to try to press upon him the "narcotics immunity" for questions relating solely to gambling.

We are not overlooking that a question, technically speaking, may have to be considered as to the applicability of the Sixth Amendment right of counsel in immunity-conferral proceedings. We have found no case dealing with this question as an explicit contested issue. One is strongly induced to expect, however, in view of this Court's recent series of decisions on the right to counsel—especially *Escobedo* v. *Illinois*, 378 U.S. 478, with its pre-indictment situa-

tion*—that the Sixth Amendment would be held applicable by this Court to immunity conferral proceedings in a case properly presenting the question, which we submit this case does.

3. We respectfully urge that, altogether, the Government's resort to the narcotics immunity provision in this case and its refusal (endorsed by both of the Courts below) to open up the Grand Jury testimony in its entirety for a judicial determination of petitioner's actual willful contemptuous refusal *vel non* in regard to the Grand Jury questions on gambling as contrasted with his full answering of all questions on narcotics, presents meritorious certiorari issues of due process of law. It is true that in granting certiorari in *Al Harris* v. *United States,* 379 U.S. 944, the Court so limited the grant as to exclude the offered issues of relevancy and of applicability of the Communications Act immunity provision (47 U.S.C. §409(1)). However, we think it is appropriate to look behind what may be termed the *stare decisis* "folk lore" of the *Harris* decision in the Court of Appeals (334 F. 2d 460). The latter decision held that where a Grand Jury subpoena stated that the Grand Jury was investigating alleged violations of the Federal Communications Act, 47 U.S.C. §§ 203 and 501, where the witness declined to answer questions concerning a telephone call from Florida to New York City for the purpose of promoting an illegal dice game in Florida, and where the witness after receiving immunity under § 409(1) of the Communications Act persisted in his refusal to answer, the witness was properly convicted of contempt. The Court of Appeals said (334 F. 2d at p. 463):

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* Cf. the operation of the Fifth Amendment privilege beyond the area of criminal trials as such. *Counselman* v. *Hitchcock,* 142 U.S. 547; *McCarthy* v. *Arndstein,* 266 U.S. 34, 40.

"* * * In support of its own position the government weaves the following argument: The Federal Communications Act makes unlawful the act of any person causing a telephone company to extend telephone services not provided for in its tariffs, 47 U.S.C. §§ 203, 501. The tariff of the American Telephone & Telegraph Company, joined in by the Southern Bell Telephone & Telegraph Company, states that telephone service shall 'not be used for an unlawful purpose.' Thus, the government contends, when an individual uses telephone facilities for an unlawful purpose he causes the telephone company to extend to him services not provided for in its tariffs and consequently to violate the Communications Act.

On facts quite analogous to those here presented, the Third Circuit held that the government had sufficiently established the necessary link of a possible violation of the Communications Act, on the theory which the government here proffers. Marcus v. United States, 310 F. 2d 143 (3 Cir. 1962), cert. denied, 372 U.S. 944, 83 S. Ct. 933, 9 L. Ed. 2d 969 (1963). See also United States v. Testa, 326 F. 2d 730 (3 Cir.), cert. denied, 376 U.S. 931, 84 S. Ct. 701, 11 L. Ed. 2d 652 (1964). Moreover, the government refers us to indictments which have been returned in other districts charging violations of the Communications Act under similar circumstances. Finally, we must recognize that the scope of the grand jury's investigation is not limited to the specific questions put to Harris. Indeed, further questioning might conceivably reveal the use of telephone facilities on a large scale in the promotion of unlawful enterprises, and corruption in connection therewith, which would certainly constitute a violation of the Communications Act, at least to the extent of any participation by telephone company representatives. On balance,

> we hold, as did the Third Circuit, that the government has established that the grand jury investigation here is a proceeding 'based upon or growing out of [an] alleged violation of [the Federal Communications Act].'"

In the *Marcus* case cited in *Harris (supra)* (310 F. 2d 143) the very heart and gist of the Grand Jury subject matter was an inquiry as to whether the witness had been involved in a controversy over refusal of the Telephone Company to install twelve telephones in his office, the Court saying that "The questions asked plainly showed that the inquiry was concerned, *inter alia,* with unlawful use of telephones to transmit gambling information" (310 F. 2d at p. 145), and that "Above all it should be remembered that the dispositive factor as to the Court's direction (i.e., directing the witness to answer the Grand Jury's questions) is that the questions which were actually asked of appellant were directly within the purview of the investigation" (310 F. 2d at p. 146). Interestingly, the *Marcus* decision contains no indication that the Government had presented for the Court's consideration, or that the Court had considered, any such theory as the one mentioned in the *Harris* quotation, *supra,* where, as the Court put it, "the Government weaves" its argument to support the Communications Act subject matter. Likewise in the *Testa* case in the Third Circuit (326 F. 2d 730) (also cited in *Harris, supra*), where the *Marcus* ruling was followed, there is no indication that the Court was proffered (by the Government) or itself considered any such theory as to the Communications Act subject matter (see 326 F. 2d at p. 734, fn. 3, dissenting opinion of Judge Kalodner on petition for rehearing). Also, the factual recitals in the *Testa* case afford no indication that

the Communications Act subject matter there was so remote and so artificial as Harris claimed was true in his case.

What we are suggesting is that the *Harris* case, with its free exegetical reliance on the *Marcus* and *Testa* cases, has unjustifiably announced a *fait accompli* by a supposed judicial evolution to the effect that the Government, so far as appears, is practically without restriction in using one or another of the specific-subject-matter Federal immunity statutes as a means of inquiring into practically anything which zealous prosecutive officials may choose to denominate, no matter how conclusorily, as possessing or potentially possessing some "crime" involvement. And while we are not here of course waging a certiorari battle under the Communications Act, the doctrinal authoritativeness which appears to have attached to the *Harris-Marcus-Testa* concept of a practically plenary immunity reach under the latter statute, wrongly tends to prejudice, we fear, our position that an over-reaching of the narcotics immunity power has been effected in our case. Consequently, we would call attention to the following additional defects in the reasoning of the above mentioned Communications Act immunity cases:

It does not appear that any point was raised or considered in the *Harris, Marcus* or *Testa* cases as to the constitutional question of whether a "violation" of the Communications Act may be founded upon "violation" of a "tariff" filed with the Federal Communications Commission by a private company. From the *Harris* case quotation supra, and from the language of §§203 and 501 of the Communications Act (47 U.S.C.), it is manifest that Congress has not itself set up the "prohibitions" against "unlawful"

use of telephones within the meaning of the *Harris-Marcus-Testa* theory, but that it is the Telephone Company (or Companies) which has "legislated" these criminal "statutory prohibitions". In short, the criminal prohibition that is mounted by the *Harris-Marcus-Testa* theory derives from what amounts in effect to an unconstitutional delegation of legislative power to private persons (the Telephone Companies). Moreover, under that theory, these private persons are permitted thus to "legislate" criminal prohibitions through the medium of filed "tariffs" which, to be perfectly realistic, virtually no one except a few telephone company officials and a few Federal Government officials ever see. There is no slightest clue or hint in the Congressional legislation itself that such "tariffs" are to be thought of by the ordinary citizen as importing substantive criminal prohibitions as to the purposes for which telephones are to be used; §203 of the Communications Act may be read in vain for any such clue or hint, that provision on its face being nothing more than a law relating to schedules of charges for telephone service, overcharges, rebates etc.; and §501 of the Communications Act being merely a "general penalty" provision. Authorities enunciating the axiom that legislative power may not be delegated to private groups are, e.g., *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936); *Wagner* v. *Milwaukee*, 177 Wis. 410, 188 N.W. 487 (1922); and authorities collected in *Davis, Administrative Law* (1951), s. 21, and *Gellhorn, Administrative Law* (2d Ed. 1947), pp. 88-89.

Furthermore, there is an even more fundamental defect in the *Harris-Marcus-Testa* theory, namely, that the statute (47 U.S.C. §203), pursuant to which such Telephone Company

"legislation" is supposedly "enacted" (*per* Telephone Company tariffs) does not actually authorize such delegated legislative power to be exercised by the Telephone Companies. The latter statute speaks only of schedules of charges, and of over-charges and rebates, etc., declaring that such schedules of charges (i.e., the "tariffs" as they are commonly referred to) shall be filed with the Federal Communications Commission, and provides further that such schedules are to show also "the classifications, practices, and regulations affecting such charges". This latter language as to "regulations" etc. "affecting such charges" is the nearest that §203 comes to even remotely supporting any suggestion that the Telephone Company tariffs might contain provisions other than the "charges" themselves, and this language in regard to "regulations" etc. goes no farther than to authorize such "regulations" etc. *"affecting * * * charges"*. In other words there is nothing in §203 about "regulations" in any sense beyond regulations concerning the charges payable for services rendered by carriers under the Federal Communications Act. Which is to say that there is no authorization in §203 for any such Telephone Company tariff "regulation" as is supposed to be applicable in the *Harris-Marcus-Testa* cases, i.e., a prohibition against using a telephone for an "illegal" purpose. Nor can we find any regulation by the Federal Communications Commission implementing any such supposed statutory authorization—see *Code of Federal Regulations,* Title 47 ("Telecommunications"). In *Ambassador, Inc.* v. *United States,* 325 U.S. 317, the Court, in ruling that Telephone Company tariffs could legally regulate the charges made by hotels in connection with telephone use by guests, said (p. 323):

> "Of course, such authority is not unlimited. The telephone companies may not, in the guise of regulating the communications service, also regulate the hotel or apartment house or any other business. * * *"

This is a recognition that Telephone Company tariffs of charges for telephone service are not to be countenanced as a device for imposing substantive regulatory controls upon the conduct or activities of telephone users. While the Court in the *Ambassador* case, *supra,* also said that the Communications Act "recognizes that tariffs filed by communications companies may contain regulations binding on subscribers as to the permissible use of the rented communications facilities" (p. 323), it is evident that the Court was there speaking strictly in the context of a Federal regulatory power to prevent "an unjust or unreasonable discrimination or preference" (*ibid*) in the schedules of rates and charges for communications services; and while the Court also said in this same portion of the opinion in the *Ambassador* case that "the supervisory power of the Commission is not limited to rates and to services, but the formula oft repeated in the Act to describe the Commission's range of power over the regulated companies is 'charges, practices, classifications, and regulations for and in connection with such communications service' * * * 47 U.S.C.A. §201(b) * * *" (*ibid*), the Court in this language likewise was speaking of the subject matter and aim of the Communications Act in regard to maintaining "just and reasonable" tariffs of communications company charges for services. Besides, in referring to *§201(b)* of the Communications Act (in the portion of the *Ambassador* opinion last quoted), as allowing the broad range indicated for the Federal regulatory power under this statute, the Court was

not referring to §*203;* that provision, as we have seen, is cast expressly and solely in terms of "schedules of charges" and "regulations" etc. "affecting such charges". If Congress had intended to let the Telephone Companies themselves, *via* their filed tariffs, import into the Federal regulatory (and indeed criminal prohibitory) scheme under this legislation provisions concerning "illegal" use of telephones, it could readily have done so. There is not one word in the Federal Communications Act from which any such Congressional intention may be spelled out. And it is no answer to this to say that the Federal Communications Commission itself, under the broader language of §201(b)—upon which the Court commented in the *Ambassador* case, *supra*—could adopt general regulations concerning such "illegal" use of telephones, because even if it were conceded (which we respectfully decline to do) that the Commission could in this manner create *criminal prohibitions* of this drastic sort when Congress has not seen fit to do so, such *arguendo* concession would not justify the conclusion that the Telephone Companies themselves are given this ominous power to incorporate such criminal prohibitions in their filed tariffs.

We thus see the following really extraordinary situation under the *Harris-Marcus-Testa* theory:—The Communications Act lets the Telephone Companies file "schedules of charges" (tariffs) which may contain also "regulations" etc. "affecting such charges" (§203). The Telephone Companies then file tariffs which go drastically further by including a prohibition against use of telephone for "illegal" purposes (e.g., gambling). The Government then invokes such manifestly *ultra vires* tariffs as assertedly forming the basis for next invoking §501 of the Communications Act

which, as noted is merely a "general penalty" provision to punish persons who violate the Communications Act. Not only, then, is there an absolute lack of statutory authority for a Telephone Company tariff prohibition against "illegal" use of telephones, and not only (consequently) is there an absolute lack of any basis for spelling out a statutory violation upon which the general penalty of §501 may operate, but, even more strange, there would have to be an abrogation of the constitutional ban against delegation of legislative power to private persons* in order to sustain as valid this remarkable attempted reading of the statutory language.

Again, we have essayed this rather lengthy *critique* of the *Harris-Marcus-Testa* theory not merely because we are convinced that theory is wrong, but because it is a wrong theory which we fear must, unless corrected, substantially prejudice our case on the issues of the relevancy of the Grand Jury questions and the refusal to open up the Grand Jury minutes in their entirety. In the case of *Al Harris* the Government had a telephone call "to work with", and so it used the Communications Act immunity provision to inquire into gambling, as to which no Federal immunity statute exists. In our case the Government, in an endeavor to search into the identical alleged gambling situation (allegedly involving Tramunti and Harris), apparently did not have any telephone calls upon which to poise its immunity blunderbuss, and so instead it invoked

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* *A fortiori* in the circumstances of cases like *Harris* (and, by analogy, our case) this traditional constitutional ban would have to be abrogated in regard to the most potent of all forms of legislative power, the legislative power to declare what are crimes.

the narcotics immunity provision in a no less blunderbuss fashion.

The issue presented is not only the question of the legal propriety or the downright seemliness of this sort of juggling of immunity scatterguns. In our case there is present also the more concrete, sheer issue of whether a perusal of the Grand Jury testimony as a whole would have fortified the defense contention that Tramunti's answers before the Grand Jury on November 12, 1964 had left the Government with not even an ostensible cause to persist in its claim that it was interested in Tramunti's testimony from a narcotics standpoint. As seen, Tramunti had told Judge Wyatt that he would answer everything about narcotics, including everything of a mixed narcotics-gambling character. The Government (and both of the Courts below) were nevertheless of the view that Tramunti's refusals to answer included narcotics-connected refusals. But the only colorable indication of this is the fifth question which Tramunti is alleged to have refused to answer; we again quote that fifth question (7a; and see Appendix A hereto, *infra*):

> "Cavalliere and Rosato are alleged to be connected with you in gambling activities, particularly in dice games. These two individuals are also known to be active in the narcotics field. Have you ever had any gambling contacts with any one of them?"

Two observations are necessary concerning Tramunti's alleged refusal to answer the above question:—(1) From a reading of the portion of the Grand Jury transcript of November 12, 1964 which the Government consented to allow into the record in the within contempt trial, it appears that Tramunti was never even asked the above quoted

question in the form there given (evidently this formulation came from the Government's affidavit in support of the Government's order to show cause for contempt (7a)). What Tramunti was actually asked consisted of the first two sentences of the above quoted question followed by the sentence "What do you know about their narcotics activities", to which he replied "Nothing" (126a). The third sentence as given in the Government's formulation above quoted, namely, "Have you ever had any gambling contacts with any one of them", was an entirely separate question removed from the main question by seven other subsequent questions (126a). What the Government did in its moving papers for the contempt proceeding, and what both of the Courts below assumed to be correct upon the basis of the Government's formulation, was to graft the latter sentence onto the first two sentences of the above quoted three-sentence question, amputating from the latter question the actual third sentence which, significantly, made it clear (along with Tramunti's answer, "Nothing"), that Tramunti was willingly telling the Grand Jury everything he knew about narcotics (which was "nothing") in connection with Cavaliere and Rosato even though he was being advised that the latter two men were alleged to be connected with him in gambling activities. (2) As earlier noted, when Judge Wyatt put to Tramunti, at 30a-36a, the entire series of questions with a view to ascertaining which ones Tramunti would answer, he manifested a perfect willingness to answer all questions about narcotics, and he even said he would answer the question of "whether he ever had any gambling contact with" Cavaliere and Rosato (36a, top of page). In these circumstances, is it not compellingly indicated that Tramunti should have been given the benefit,

at his contempt trial before Judge Wyatt, of an examination of the entire Grand Jury testimony of November 12? How can it be said, beyond a reasonable doubt, that the alleged refusal to answer the artificially grafted-together three-sentence question above quoted was sufficient in itself to establish the Government's contentions in regard to that question—the remaining four allegedly contemptuous refusals being, again, on their face wholly unrelated to narcotics (7a)—except, of course, on the "theory" that *any* gambling by a man of Tramunti's reputed associations *might* have a narcotics connection. But it is precisely this latter theory which, we earnestly urge, imports into immunity-contempt cases of this type an element of overreaching and injustice on the part of the prosecutive arm of the Federal government. Cases of this type, overreaching prosecutive pretensions of this type, are a peril to the due process right of proper confinement of official interrogation of witnesses to a proper jurisdictional ambit. Cf. *Watkins* v. *United States,* 354 U.S. 178; *Scull* v. *Commonwealth of Virginia,* 359 U.S. 344.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

PHILIP R. EDELBAUM
Attorney for Petitioner

APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 360—September Term, 1964.

(Argued March 10, 1965 Decided April 5, 1965.)

Docket No. 29387

UNITED STATES OF AMERICA,

Appellee,

—v.—

CARMINE TRAMUNTI,

Appellant.

Before:

SMITH and MARSHALL, *Circuit Judges,* and METZNER, *District Judge.**

Carmine P. Tramunti appeals from sentence of imprisonment for one year imposed on judgment of conviction of contempt of court after trial to the Court without jury in the United States District Court for the Southern District of New York, Inzer B. Wyatt, Judge. Affirmed.

ANDREW M. LAWLER, JR., Assistant United States Attorney for the Southern District of New York (Robert M. Morgenthau, United States Attorney and John E. Sprizzo, Asst. U. S. Attorney, So. District of New York, on the brief), *for appellee.*

* Sitting by designation.

Appendix A

PHILIP R. EDELBAUM, New York, N. Y., *for appellant.*

SMITH, *Circuit Judge*:

Carmine P. Tramunti, convicted on trial to the Court in the Southern District of New York without jury, Inzer B. Wyatt, *District Judge,* of contempt of court under 18 U. S. C. §401, F. R. Crim. Proc. 42(b)[1] for refusal to answer questions before a Grand Jury when ordered to do so by the Court after a grant of immunity under 18

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[1] Title 18, United States Code:

§401. Power of court

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Federal Rules of Criminal Procedure

Rule 42. Criminal Contempt

(b) *Disposition Upon Notice and Hearing.* A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charge involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

U. S. C. §1406,[2] appeals. We find no error and affirm the judgment.

Appellant contends principally that the grant of immunity was invalid because his counsel was not present when the grant was made, that he was entitled to a jury trial on the contempt charge, that the sentence was excessive, that

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[2] Title 18, United States Code:

§1406. Immunity of witnesses

Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of—

(1) any provision of part I or part II of subchapter A of Chapter 39 of the Internal Revenue Code of 1954 the penalty for which is provided in subsection (a) or (b) of section 7237 of such Code,

(2) subsection (c), (h), or (i) or Section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U. S. C. sec. 174), or

(3) the Act of July 11, 1941, as amended (21 U. S. C., sec. 184a) is necessary to the public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify, or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section. Added July 18, 1956, c. 629 Title II, §201, 70 Stat. 574.

the questions he refused to answer were not relevant to the inquiry, that he was entitled to the production of the minutes of the Grand Jury on all the questions, not limited to those he refused to answer, and that immunity was not complete under the statute.

The questions which Tramunti refused to answer were:

> "When were you down in Florida last?
>
> "Isn't it a fact that you ran a fairly successful dice game down in Dade County?
>
> "Who's Allie Harris?
>
> "How is the dice game going up in Harlem?
>
> "Cavalliere and Rosato are alleged to be connected with you in gambling activities, particularly in dice games. These two individuals are also known to be active in the narcotics field. Have you ever had any gambling contacts with any one of them?"

On February 13, 1964 Tramunti refused to answer questions put by a Grand Jury in the Southern District of New York then inquiring into alleged violations of the federal narcotics laws. Again on April 23, after being informed that there was information that the Lucchese mob was engaged in various illegal activities, principally the illicit narcotics traffic, and that it had been alleged that Tramunti was a member of this group, Tramunti refused to answer any questions before the Grand Jury. He refused again on May 7, 1964.

On August 4, 1964 the United States Attorney with the approval of the Attorney General, applied under 18 U. S. C. §1406 for an order compelling Tramunti's testimony. Appellant's attorney was at the time on a two-week tour of military duty, which was made known to the United States

Attorney and the Court. The Court, Lloyd F. MacMahon, *District Judge,* found that the statutory conditions were met, that complete immunity was afforded, and instructed Tramunti to return to the Grand Jury and answer the questions, but adjourned his next appearance to allow him to consult counsel. Tramunti was next called before the Grand Jury November 10, 1964, when he was accompanied by counsel and permitted to consult him outside the grand jury room. He persisted in his refusal. November 12, 1964 at the request of the Grand Jury, appellant was brought before Judge Wyatt, who, after a hearing at which appellant was represented by counsel, reached the same determination as had Judge MacMahon, and directed the witness to answer. The witness answered other questions relating directly to narcotics traffic but still declined to answer the five questions on which he was charged with contempt. Hearing was had on notice and order to show cause why the witness should not be held in contempt, pursuant to Rule 42(b) Federal Rules of Criminal Procedure, November 19 and 24. On December 2, 1964 Judge Wyatt held appellant in contempt and ordered him imprisoned for one year "or until further order of this Court, should Carmine P. Tramunti answer before the September 1963 Grand Jury the questions which appear on the record as he was ordered to answer and should defendant answer those questions before the expiration of said sentence or the discharge of said Grand Jury, whichever may first occur, the further order of this Court may be made terminating the sentence of imprisonment. . . ."

Since the sentence here is based on Tramunti's refusal to answer after Judge Wyatt, in a proceeding at which

Tramunti was represented by counsel, had found that complete immunity existed, and ordered the questions answered, the claimed invalidity of the proceedings before Judge MacMahon is without significance here. If a court found those proceedings invalid at the time the remedy would have been another proceeding with counsel present, and this was had here, with any relief available that would have been available before Judge MacMahon.

The claim that Tramunti was entitled to jury trial and that the sentence was excessive in the absence of a jury trial, based on the footnote to the Supreme Court's opinion in *United States* v. *Barnett,* 376 U. S. 681, 695 n. 12, was rejected by this court in *United States* v. *Harris,* 334 F. 2d 460, cert. granted —— U. S. ——, to which we adhere. Here, as in *Harris,* the contempt was committed in the presence of the Court, by defiance of a lawful order to respond to questions after grant of immunity.

We find no merit in the contention that the immunity was less than complete in that it did not protect against state as well as federal prosecutions. That it does cover state prosecutions is settled by *Reina* v. *United States,* 364 U. S. 507 (1960).

We reject also the argument that there is no immunity here since the statute permits immunity only in narcotics investigations, that immunity has not been granted for gambling investigations and that this is a gambling investigation thinly disguised. As we stated in *Harris,* in its investigation of a particular crime the Grand Jury may well unearth evidence of violations of other criminal provisions as well, and the immunity extends to all testimony insofar as that testimony bears a substantial relation to the subject

matter of the immunity provision, citing *Heike* v. *United States,* 227 U. S. 131, 142-143 (1913). Here the information sought dealt directly with the possible financing of narcotics activity by an identified criminal organization through moneys derived by other criminal activities, in this case organized gambling. That such inquiries are relevant to investigation of possible violation of the narcotics laws admits of no doubt. The Congress has found the nature of the illicit narcotics traffic of sufficient public importance to authorize the broad grant of immunity provided in the statute. *Reina* v. *United States, supra* at 511, 512.[3] The courts will not so narrowly confine the inquiries of grand juries into this traffic as to defeat the purpose of the statute.

Judge Wyatt found the requisites of the statute complied with, and we agree. We uphold also his ruling on

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[3] "It can hardly be questioned that Congress had a rational basis for supposing that the grant of state as well as federal immunity would aid in the detection of violations and hence the more effective enforcement of the narcotics laws. The Congress has evinced serious and continuing concern over the alarming proportions to which the illicit narcotics traffic has grown. The traffic has far-reaching national and international roots. See S. Rep. No. 1997, 84th Cong., 2d Sess., pp. 3-6. The discovery and apprehension of those engaged in its present particularly difficult problems of law enforcement. The whole array of aids adopted in 1956, of which immunity is but one, was especially designed to permit enforcement officers to operate more effectively.' H. R. Rep. No. 2388, 84th Cong., 2d Sess., p. 10. The grant of both federal and state immunity is appropriate and conducive to that end, and that is enough. Even if the grant of immunity were viewed as not absolutely necessary to the execution of the congressional design, '[T]o undertake here to inquire into the degree of . . . necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground.' *McCulloch* v. *Maryland,* 4 Wheat. 316, 423."

the relevance of the questions asked to the inquiry. Refusal to answer, based solely on the witness' opinion on relvancy and scope of immunity was a contempt.

Appellant's claims of lack of proof beyond a reasonable doubt, and denial of due process in that he was not allowed to examine and place in evidence the Grand Jury minutes, are not well taken. The questions he refused to answer and their relevancy were established. He knew whether he had in fact answered other similar questions, and his persistent refusal to answer these makes the claim that he might have done so dubious in the extreme. There is no showing here sufficient to overcome the desirability of secrecy of grand jury procedings so that others under investigation and other prospective witnesses might not be warned of what had been asked and answered and so aided in thwarting the inquiry. Rule 6(e) F. R. Crim. Proc. *Pittsburgh Plate Glass Co.* v. *United States,* 360 U. S. 395, 399-401 (1959).

The mixed nature of the sentence, permitting consideration of reduction if appellant purged himself of the contempt by answering the questions, does not appear to prejudice the appellant. In *Brown* v. *United States,* 359 U. S. 41 (1959), summary conviction under Rule 42(a) and sentence to 15 months imprisonment for refusal to testify was upheld. The dissent attacked the absence of a purge clause. And see *United States* v. *Castaldi,* 338 F. 2d 883, 2 Cir. 1964.

The judgment is affirmed.

APPENDIX B

Judgment of United States Court of Appeals Sought to be Reviewed

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifth day of April one thousand nine hundred and sixty-five.

Present:

HON. J. JOSEPH SMITH,
HON. THURGOOD MARSHALL,
Circuit Judges,

HON. CHARLES M. METZNER,
District Judge.

United States of America,

Plaintiff-Appellee,

v.

Carmine P. Tramunti,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

Appendix B

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

A true copy,

A. DANIEL FUSARO
Clerk

(Seal)

APPENDIX C

Motion and Affidavit in United States Court of Appeals for Leave to File Petition for Rehearing Out of Time

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 29387

UNITED STATES OF AMERICA,

Appellee,

—against—

CARMINE TRAMUNTI,

Appellant.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING OUT OF TIME

To the Honorable J. Joseph Smith and Thurgood Marshall, Circuit Judges and the Honorable Charles M. Metzner, United States District Judge, sitting herein by designation:

Appellant CARMINE TRAMUNTI hereby respectfully moves for leave to file, out of time, a petition for rehearing in the above entitled matter; a copy of the proposed petition for rehearing is annexed hereto. The grounds and reasons in support of this motion that the annexed petition for rehearing be entertained even though it is filed after the time

provided in the rules, are set forth in the affidavit of PHILIP R. EDELBAUM, ESQ., annexed hereto.

WHEREFORE, it is respectfully prayed that this motion be granted.

Respectfully submitted,

PHILIP R. EDELBAUM
Attorney for Appellant
Carmine Tramunti
Office & P.O. Address
250 Broadway
New York 7, N.Y.

To:

HON. ROBERT MORGENTHAU
United States Attorney,
Southern District of New York
United States Courthouse
Foley Square
New York, N.Y.

HON. A. DANIEL FUSARO
Clerk,
United States Court of Appeals,
Second Circuit
United States Courthouse
Foley Square
New York, N.Y.

Appendix C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 29387

UNITED STATES OF AMERICA,

Appellee,

—against—

CARMINE TRAMUNTI,

Appellant.

AFFIDAVIT

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

PHILIP R. EDELBAUM, being duly sworn, deposes and says: That I am the attorney for the above named appellant Carmine Tramunti. That I am familiar with the facts of this matter and I make this affidavit in support of the appellant's motion for leave to file a petition for re-hearing after expiration of the time provided by the rules of this Court.

The rehearing is sought with respect to the judgment of this Court rendered in this appeal on April 5, 1965.

The within motion for leave to file out of time this petition for rehearing occurs in the following circumstances: In connection with appellant's forthcoming petition to the United States Supreme Court for certiorari in this case—Mr. Justice Harlan having extended our time for certiorari

to June 4, 1965—the undersigned attorney for appellant engaged a consultant who brought to our attention certain points in this case which, regrettably, we had not raised in the District Court or in the appeal before this Court. Said consultant has also advised that, if it be at all possible to submit those new points for consideration by this Court and to obtain a ruling thereon by this Court before formal action by the Supreme Court of the United States on our forthcoming petition of certiorari, it would be of material assistance to the appellant; otherwise, we would be asking the Supreme Court of the United States to pass upon questions which we had not raised in this Court or in the District Court.

The aforementioned new points as to which we are herewith moving for permission to raise by a late-filed petition for rehearing are recited in full in the proposed petition for rehearing, which has already been printed, and a copy of which is annexed hereto.

WHEREFORE, it is respectfully prayed that the within motion for leave to file out of time a petition for rehearing should be granted.

/s/ PHILIP R. EDELBAUM
Philip R. Edelbaum

Sworn to before me this
25th day of May, 1965.

BARBARA C. SCHWARTZ
Notary Public, State of New York
No. 24-3549430
Qualified in Kings County
Commission Expires March 30, 1967

APPENDIX D

Proposed Petition for Rehearing in United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 29387

UNITED STATES OF AMERICA,

Appellee,

—against—

CARMINE TRAMUNTI,

Appellant.

PETITION FOR REHEARING

To the Honorable J. Joseph Smith and Thurgood Marshall, Circuit Judges and the Honorable Charles M. Metzner, United States District Judge, sitting herein by designation:

Appellant Carmine D. Tramunti respectfully prays that this Petition for Rehearing be entertained although it is filed after the time provided in the rules, and that it be granted. The rehearing is sought with respect to the judgment of this Court rendered in this appeal on April 5, 1965.

The late filing of this Petition for Rehearing occurs in the following circumstances: In connection with appellant's

forthcoming Petition to the United States Supreme Court for certiorari in this case—Mr. Justice Harlan having extended our time for certiorari to June 4, 1965—the undersigned attorney for appellant engaged a consultant who brought to our attention certain points in this case which, regrettably, we had not raised in the District Court or in the appeal before this Court. Said consultant has also advised that, if it be at all possible to submit those new points for consideration by this Court and to obtain a ruling thereon by this Court before formal action by the Supreme Court of the United States on our forthcoming Petition for Certiorari, it would be of material assistance to the appellant; otherwise, we would be asking the Supreme Court of the United States to pass upon questions which we had not raised in this Court or in the District Court.

The aforementioned new points which we are herewith raising by this late-filed Petition for Rehearing are:

The due process issues which we did raise in this Court and in the District Court as to the manner in which the immunity was conferred need to be re-evaluated in the light of the following: After Tramunti had invoked his privilege against self-incrimination before the Grand Jury, the United States Attorney, acting under the narcotics-immunity statute (18 U.S.C. §1406), requested and obtained the approval of the Attorney General for the invoking of the latter statute. The Attorney General's letter of approval stated, however, that the immunity was approved in the event that Tramunti again refused to answer Grand Jury questions (101a-102a). Without waiting to take Tramunti back before the Grand Jury, i.e., without attempting to satisfy this last mentioned condition in the Attorney General's

letter of approval, the United States Attorney went right into Court to obtain an immunity conferral under the statute (13a, 23a-24a, 98a). Furthermore, that Court application by the United States Attorney was made returnable for a date (August 4, 1964) when it was known to the United States Attorney that Tramunti's attorney would be unavailable because the latter was on a mid-summer tour of Federal military service for two weeks. The immunity conferral was carried out on said return day in the absence of Tramunti's counsel, and over Tramunti's objection in regard thereto. One specific result of this was, as was only to be expected, that Tramunti did not, of course, detect the flaw in the procedure which we claim existed owing to the United States Attorney's failure to have satisfied the aforementioned condition in the Attorney General's letter. Also, upon the conferral of the immunity, the Court (Judge MacMahon) ordered the papers to be sealed, a fact whose significance will be noted *infra*. The proceedings of August 4, 1964 appear at 105a et seq.

From the time of the conferral of the immunity (August 4, 1964) the matter then sat for a little more than three months. In November, 1964, at Tramunti's contempt hearing where his counsel was present, the Court (Judge Wyatt) seemed to have "re-validated", although in the most perfunctory manner, the prior-immunity conferral which had been done in the absence of Tramunti's counsel. However, not only was this "re-validation" perfunctory, but, again, it occurred under circumstances which could not fairly have alerted even Tramunti's counsel himself to the above-mentioned flaw in the immunity proceedings because, as noted, the papers had been sealed in August, and

it is now to be noted that they remained sealed until the day of the contempt hearing in November, when, in a fast-paced sequence the now-for-the-first-time unsealed papers were made available to Tramunti's counsel and the contempt proceedings then and there went on apace, so that other issues to which Tramunti's counsel had been alerted were discussed but the issue of the United States Attorney's failure to have complied with the above mentioned condition in the Attorney General's letter of approval did not emerge at that time, and the matter quickly went forward to a contempt conviction and imposition of a one-year jail sentence (with a purge clause) on that same day. See 13a, et seq., 22a et seq.

Regrettably, also, we had not perceived, prior to the engagement of a consultant for the forthcoming certiorari application, that still another certiorari issue may be present by reason of the fact that the "re-validation" in November, 1964 of the immunity-conferral of August, 1964 may have been ineffectual because based upon a possibly stale approval by the Attorney General; Attorney General Kennedy's approval was in July, 1964 (101a), and some three and one-half months later this same "approval" was apparently *assumed* to have retained its vitality, even though no effort had been made to obtain a renewed approval in the light of intervening circumstances which might well have affected the policy judgment of the Attorney General—indeed, Attorney General Kennedy had meanwhile resigned.

Cf. the observation by Mr. Justice White (joined by Mr. Justice Stewart), concurring in *Murphy* v. *Waterfront*

Commission of New York, 12 L. Ed. 2d 678, 707, fn. 4, that Congress has indicated "concern over immunization from federal prosecution without the express approval of the Attorney General".

We respectfully believe that the foregoing casts an important new light upon the due process adequacy of the immunity conferral and on the question of denial of the right to counsel.

WHEREFORE, it is respectfully prayed that this late-filed Petition for Rehearing should be entertained and granted; it is further prayed that, consistent with the Court's convenience, the disposition of this Petition may be made as expeditiously as possible inasmuch as the extended time for filing our Petition for Certiorari expires on June 4, 1965.

Respectfully submitted,

PHILIP R. EDELBAUM
Attorney for Appellant

Appendix D

CERTIFICATE

I hereby certify that this Petition for Rehearing is presented in good faith and not for delay.

PHILIP R. EDELBAUM
Attorney for Appellant

Dated: New York, N. Y.
May 20, 1965

APPENDIX E

Order of Court of Appeals Denying Motion for Leave to File Petition for Rehearing Out of Time

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

CARMINE TRAMUNTI,

Appellant.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING OUT OF TIME

Motion denied.

J. J. S.

T. M.

U. S. C. JJ.

C. M. M.

U. S. D. J.

June 1st, 1965

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 218

CARMINE P. TRAMUNTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–8a; R. 134–141) is reported at 343 F. 2d 548.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 1965 (R. 142). Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including June 4, 1965, and the petition was filed on June 4, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner could properly be sentenced to one year's imprisonment for contempt, conditioned

upon his continued refusal to testify before a grand jury, after a non-jury hearing conducted under Rule 42(b) of the Federal Rules of Criminal Procedure.

2. Whether petitioner was lawfully granted immunity with regard to questions which he refused to answer before the grand jury.

3. Whether petitioner had the effective assistance of counsel.

4. Whether petitioner was entitled to inspect the minutes of the grand jury.

STATEMENT

On December 2, 1964, in the District Court for the Southern District of New York, petitioner, in a proceeding under Rule 42(b) F. R. Crim. P., was found to be in contempt for wilfully disobeying an order to answer certain questions before the grand jury after having been granted immunity from prosecution. He was sentenced to imprisonment for one year, with the proviso that, should petitioner answer the questions prior to expiration of the grand jury's term, a further order "may be made terminating the sentence" (R. 130–131). The court of appeals affirmed (R. 142).

The pertinent facts show that in February 1964, petitioner was subpoenaed to testify before the grand jury (R. 96–97). On that occasion, as well as in April and May of 1964, petitioner refused to answer questions on the ground that the answers would incriminate him (R. 113–116, 116–119, 120–123).

On August 4, 1964, the government applied to the district court for an order requiring petitioner to testify before the grand jury under the narcotics im-

munity provisions of 18 U.S.C. 1406. The United States Attorney's affidavit alleged that the grand jury was inquiring into alleged violations of the Federal Narcotics Laws and that petitioner's testimony was necessary and material to the investigation (R. 98–100). The application was made with the approval of the Attorney General (R. 101–102). At a hearing before Judge MacMahon, the questions were read into the record (R. 106–110), and petitioner responded by reading a letter from his counsel which told petitioner to "refuse to answer any question on the ground that your attorney is on two-week activity duty with the United States Army Reserve, and is unable to be present" (R. 110–111; see also R. 129). The court informed petitioner that he had been granted full immunity and directed him to return to the grand jury and answer the questions (R. 111–112; see also Order at R. 103–104). At the suggestion of the government, petitioner's appearance before the grand jury was delayed until August 19 because his lawyer was not present (R. 14–15, 112).

On November 10, 1964, petitioner again appeared before the grand jury and refused to answer the specific questions he had been directed to answer by Judge MacMahon (R. 15). The government requested the court (Judge Wyatt) again to direct petitioner to answer and stated that if he refused to answer, the government would request an order to show why he should not be held in contempt (R. 15). Petitioner's counsel complained that petitioner had been given immunity at a time when the government

knew that petitioner's counsel could not question whether the immunity was properly granted and whether "each and every question" was relevant (R. 17–18). The court assured counsel that he need not make the argument because "I am prepared to hear you now". The court specifically stated that counsel would be given an opportunity to challenge the validity of the grant of the immunity (R. 18). Counsel said there was no basis for the immunity because petitioner had never been connected with narcotics, but only with gambling (R. 18–19). The court noted that the statute did not require that there be a showing that a witness was personally involved in narcotics activities (R. 19–20). Thereafter, the hearing was adjourned to allow counsel time to read the questions (R. 20–21).[1]

On November 12, 1964, a further hearing was had before Judge Wyatt. The judge emphasized that this was not a contempt hearing but was an attempt to use "additional persuasion" to have petitioner answer the questions and not to increase any possible penalty (R. 25, 27, 28). On the question of the relevance of the questions, Judge Wyatt stated (R. 25):

> I have examined the questions, and aside from whether or not I would review Judge MacMahon's finding, I make an independent determination that each and every one of the questions are relevant to the inquiry.

Counsel for petitioner complained that there were questions about gambling in Dade County and Har-

[1] At the close of the hearing, the court left open the question whether counsel could challenge the relevancy of the questions upon which Judge MacMahon had previously ruled (R. 21).

lem, while the investigation concerned narcotics dealings with the "so-called Lucchese group"; that some questions were about Allie Harris, a known gambler, who "has never been alleged to be a member of the Lucchese group by anybody before the McClellan Committee"; and that other questions on narcotics were unfairly phrased. He again reminded the court that counsel had not been present to contest relevancy before Judge MacMahon (R. 26–27). The court stated (R. 27):

> I have examined the questions and I rule that they are relevant.

Thereafter, questions were read to petitioner and he indicated which he would answer and which he would decline to answer (R. 30–36).[2] Later that afternoon, the grand jury reported that petitioner had declined to answer certain questions. The court directed him to appear on November 19 and show cause why he should not be punished for contempt (R. 37). A formal order to show cause was entered accompanied by an affidavit of the government outlining the proceedings and setting forth five questions which petitioner had refused to answer after being ordered to answer (R. 4–8). The specific questions were (R. 7):

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[2] Petitioner, with counsel present, refused to answer questions as to when he was last in Florida or "Who is Allie Harris" (R. 30). On the other hand, in regard to Cavallieri and Rosata, who were alleged to be members of Luciano's group, petitioner agreed to answer as to his knowledge of their narcotics activities (R. 35). He also agreed to answer, "Have you ever had any gambling contacts with any one of these individuals?" (R. 36.) A partial transcript of the subsequent grand jury pro-

(a) Q. When were you down in Florida last?

(b) Q. Isn't it a fact that you ran a fairly successful dice game down in Dade County?

(c) Q. Who's Allie Harris?

(d) Q. How is the dice game going up in Harlem?

(e) Q. Cavallieri and Rosato are alleged to be connected with you in gambling activities, particularly in dice games. These two individuals are also known to be active in the narcotics field. Have you ever had any gambling contact with any one of them?

Evidentiary hearings were held on the order to show cause on November 19 and 24, 1964 (R. 38–75). Petitioner's request for a jury trial was denied (R. 47), as was his request to see the grand jury minutes for November 10 and 12 (R. 39–40). Petitioner's counsel challenged the relevance of the inquiries regarding gambling to the grand jury's investigation of narcotics, and government counsel replied that "in the narcotics area, gambling moneys go into narcotics and vice versa" (R. 50).

On December 2, 1964, the court found (R. 76–86), *inter alia,* that the grand jury was investigating narcotic violations (R. 77); that petitioner had been given complete immunity (R. 77–78); that the five specific questions not answered by petitioner were "relevant and pertinent to the investigation being carried on by the grand jury" (R. 80); and that peti-

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ceedings shows that he adhered to this position (R. 124–128) except that when the question was phrased "Are they connected with you in dice games?", petitioner declined to answer, explaining, "Anything with dice I refuse to answer." (R. 126).

tioner was guilty of contempt (R. 80). The court sentenced petitioner to imprisonment for one year "or until the further order of this Court should [petitioner] answer before the grand jury the five questions which appear on the record and which he was ordered to answer, and should [petitioner] answer these questions before the expiration of said sentence or the discharge of the grand jury, the further order of this Court may be made terminating the sentence of imprisonment" (R. 89–90).

ARGUMENT

1. This case does not involve the procedural issues raised in *Harris* v. *United States,* No. 6, this Term, since the trial court conducted the contempt proceedings under Rule 42(b) rather than under Rule 42(a). It does, however, involve the question (also presented by *Harris*) whether a one-year sentence may be imposed after a contempt hearing in which a request for a jury is denied. The sentence in this case states more explicitly than the one in *Harris* that it will be reduced if petitioner testifies, and the judge, in granting bail, reaffirmed that the one-year sentence was designed to make the coercion effective. For with the short remaining life of the grand jury (to March 1965), it was apparent at the time of sentencing that if petitioner could delay the conclusion of this litigation until the grand jury adjourned (which he succeeded in doing), he could effectively thwart any attempt to use civil contempt remedies in order to compel him to testify. Although these differences between this case and *Harris* exist, we recognize that the

Court may wish to defer action on this case pending determination of *Harris*. In view of the expiration of the grand jury's term, further delay in this matter is of minimal prejudice to the government, and we agree that it would be appropriate to defer disposition of this case until the related issue in *Harris* is resolved.

2. There is no merit to petitioner's claim that the immunity provision was improperly invoked. The statute does not require that the grand jury's questions to a witness relate solely to the witness' personal participation in narcotics offenses. Petitioner was asked to supply information concerning persons who, by reason of successful prosecutions against them and further investigation, were known to have been involved in the narcotics traffic. These questions did not become improper merely because they related directly or immediately to such persons' participation in illegal gambling activities. For it is well known, as government counsel observed in the district court, that gambling proceeds are often used to finance narcotics activities. In view of the interrelation of various forms of organized crime, it is proper for a grand jury investigating narcotics offenses to inquire about the gambling activities of suspected narcotics-law violators. If a grand jury investigation could be halted by a demand for proof of the relevance of specific questions, the inquiring body would be seriously hampered in its inquiry. Cf., *Marcus* v. *United States*, 310 F. 2d 143 (C.A. 3), certiorari denied, 372 U.S. 944; *United States* v. *Testa*, 326 F. 2d 730 (C.A. 3), certiorari denied, 376 U.S. 931; *United States* v. *Harris*,

334 F. 2d 460 (C.A. 2), certiorari granted on other issues, 379 U.S. 944; and see *Sinclair* v. *United States*, 279 U.S. 263, 296–298.

3. Petitioner's claim that he was denied the assistance of counsel is insubstantial. With the time of the grand jury running, the government was not obliged to await the convenience of counsel in undertaking to grant petitioner immunity on August 4. Apparently counsel made no effort to have another attorney represent his client while he was away. Instead he sought to delay the proceedings by instructing petitioner not to answer questions during the two weeks that counsel would be absent. Nevertheless, the government, specifically because of counsel's absence, requested that petitioner's next appearance before the grand jury be delayed until counsel returned. Hence no right of petitioner was prejudiced by this hearing. The only claim counsel later sought to invoke, namely the relevance of the questions to the narcotics inquiry, was fully heard and ruled upon by the court (see pp. 3–5, *supra*).[3]

[3] In the court of appeals (Pet. App. D 15a–19a) and in this Court, petitioner has presented an issue regarding the scope of Attorney General's immunity authorization. The Attorney General's letter, dated July 23, 1964, stated, *inter alia* (R. 101–102): "Should this witness claim said privilege against self-incrimination, therefore, you are authorized to make application" for a court order. Petitioner argues that this is a "conditional" approval which required that subsequent to July 23 and prior to the August 4 grant of immunity, petitioner be brought before the grand jury to claim his privilege. Petitioner does not contend that he would not have claimed his privilege if he had been recalled. In view of his total refusals in February, April and May, another trip to the grand jury

4. Petitioner's claim that his counsel should have been allowed to inspect the minutes of the grand jury was properly rejected by the courts below. The questions which were asked of him were stated in open court, and they were found to be relevant to the grand jury's inquiry. No disclosure of the remainder of the inquiry was necessary or appropriate. See *Pittsburgh Plate Glass Company* v. *United States*, 360 U.S. 395, 399–401; *United States* v. *Levine*, 267 F. 2d 335 (C.A. 2).

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
THEODORE GEORGE GILINSKY,
Attorneys.

JULY 1965.

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would obviously have been fruitless. Petitioner's subsequent refusal to answer after he was accorded immunity belies his present suggestion that he might have answered prior to the grant of immunity had he been recalled at that time. Moreover, the language in the Attorney General's letter was merely intended to insure that the witness would claim his privilege before being granted immunity; petitioner here did so on three prior occasions.

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IN THE

Supreme Court of the United States

October Term, 1964

No. 218

CARMINE P. TRAMUNTI,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY TO THE MEMORANDUM FOR THE UNITED STATES

PHILIP R. EDELBAUM
Attorney for Petitioner
Carmine P. Tramunti

32 CASE PRESS INC., 421 Hudson St., N.Y.—ORegon 5-4540

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PETITIONER'S REPLY TO THE MEMORANDUM FOR THE UNITED STATES

In the "Memorandum for the United States" in this case, the Government had made certain statements to which I feel obliged to reply notwithstanding that the Government has also made the gratifying suggestion that the Court may wish to defer action on this case pending the determination of *Harris* v. *United States,* No. 6, this Term.

On Page 9 of its Memorandum, the Government states:

> "3. Petitioner's claim that he was denied the assistance of counsel is insubstantial. With the time of the grand jury running, the Government was not obliged to await the convenience of counsel in undertaking to grant petitioner immunity on August 4. Apparently counsel made no effort to have another attorney represent his client while he was away. Instead he sought to delay the proceedings by instructing petitioner not to answer questions during the two weeks that counsel would be absent. * * * "

This imputation that counsel had a dilatory motivation is unwarranted. The unfairness of the imputation is revealed when one scrutinizes the Government's above quoted prefatory words, "With the time of the grand jury running"—which suggest that this Grand Jury was fighting against time, that counsel knew it, and that counsel resorted to unworthy delaying tactics. The facts are: The witness-petitioner Tramunti was "processed" by this Grand Jury in an altogether leisurely manner as regards time, for Tramunti was first before the Grand Jury on February 13, 1964, then a second time not until April 23, 1964, and then again on May 7, 1964—all of which appearances preceded the appearance of August 4th when, for the first time, counsel was absent because he had to be absent owing to military duty, counsel having been present at all of the prior times. After August 4, 1964, the Government did not bother to bring Tramunti back before the Grand Jury again until November 10, 1964, although the same Grand Jury was in session during September and October. And this same Grand Jury was in existence until the middle of March, 1965. During the oral argument before the Second Circuit, the Court asked the Government what was the hurry in proceeding on August 4, 1964 in the absence of Tramunti's counsel, and the Government replied that the Grand Jury was going on vacation until September and that they were thinking of the convenience of the Grand Jury. The above quoted statement in the Government's Memorandum in this Court is the first time that the Government has raised any issue of the supposed running out of the time of the Grand Jury.

Respectfully submitted,

PHILIP R. EDELBAUM
Attorney for Petitioner
Carmine P. Tramunti